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Pages 1019 to 1434

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This is the last pamphlet of Volume 94.

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–Family Television, Inc.

Petition for review of Bureau's action returning application denied. Since the applicant's proposed service area already receives the signals from two full-service stations, the applicant's provision of a first local service does not meet the Commission's freeze exemption criteria for new proposals and the application is therefore dismissed.
–P.M. B/cing Co., Inc.

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–Decency In B/cing, Inc.

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–Integrated Services Digital Networks
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Common Carrier, International

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GEN. Docket No. 80–112.

Common Carrier, Rate or Tariff Unlawful
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–Pittsfield Community TV Assn.
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(See: Common Carrier-*Integrated Services Digital Networks*)

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–*RF Lighting Devices*
Gen. Docket No. 83–806

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Lighting, Radio Frequency
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In this *Tentative Decision and Request for Further Comment* (BC Docket 82–345), the Commission reviewed its network television financial interest and syndication rules (47 C.F.R. §73.658(j)). The Commission concluded that the financial interest rule could be eliminated without adverse consequence to the public but that a modified version of the syndication rule should be retained.
–Amendment of Part 47
BC Docket No. 82–345

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Network Program Procurement Practices
Network Regulation
Syndication, Network

In this *Tentative Decision and Request for Further Comment* (BC Docket 82–345), the Commission reviewed its network television financial interest and syndication rules (47 C.F.R. §73.658(j)). The Commission concluded that the financial interest rule could be eliminated without adverse consequence to the public but that a modified version of the syndication rule should be retained.
–*Amendment of Part 47*
BC Docket No. 82–345

FCC 83–377

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of 47 CFR §73.658(j)(l)(i) and (ii), the Syndication and Financial Interest Rules.	BC Docket No. 82–345

TENTATIVE DECISION AND REQUEST FOR FURTHER COMMENTS

(Adopted: August 4, 1983; Released: August 12, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

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I. *INTRODUCTION AND BACKGROUND*

Introduction

1. In this proceeding, through our *Notice of Proposed Rule Making in BC Docket 82–345*, 47 Fed. Reg. 32959 (1982), we sought comment on a proposal to repeal the network television financial interest and syndication rules. The rules, 47 CFR §73.658(j), regulate the rights the national television broadcast networks may acquire or retain in programming used for network distribution.

2. A brief description of the process of network program development will help place these rules and this proceeding in perspective. The prime time entertainment series that are aired on the networks are generally produced by the major film studios, major independent producers or minor independent producers. The networks serve as producers of a small number of their own programs, but their production activity is limited by the respective consent decrees that each has entered into with the Department of Justice.

3. The process of developing an entertainment series varies among the networks, although there are some common elements. In general, program ideas come from network development departments or producers. A producer can either present an idea directly to a network or to the network through an agent or major studio. A program passes through four stages of development: 1) the treatment; 2) a pilot script; 3) a pilot; and 4) series production. The network development departments finance the first three stages and may terminate the process at any point. The financial terms negotiated between networks and producers at the developmental stages vary greatly, but may include fees, delivery dates, options and possibly the license fee if the program should become a series. Since

pilots are expensive, relatively few are made in proportion to the number of treatments and scripts ordered by the networks, and only a fraction of the pilots that are made become series. For example, CBS had pilots made for 32 shows out of the 155 scripts it had ordered for the 1982–83 TV season. From these 32 pilots, 13 new prime time series were created.

4. The producer of a TV series is paid a license fee by the network for each episode produced. The license fee entitles the network to exclusive rights to air the program for a period of time. Typical license fees are about $300,000 for a half hour show and approximately $600,000 for an hour series. License fees can be renegotiated during the run of a series.

5. Successful network programs have value beyond their network run. They can be sold to individual stations through the syndication market. Syndicators may be studios, multiple station groups, advertisers or companies set up specifically to act as syndicators. Under individual contract terms, off-network syndication may begin following the expiration of the licensing network's exclusivity protection for each episode. The most important characteristic common to all off-network syndicated programs is that they have achieved successful network runs in prime time. For a program to be syndicatable, it must have run long enough on the network to have approximately 80–100 episodes. The large number of episodes is required because the off-network syndicated series is usually broadcast daily, in the same time period, a practice known as stripping.

6. The rights to syndicate a program are often negotiated early in the production process. An established producer may even be able to obtain a cash advance from a syndicator based on prospective syndication of a series. The negotiations between producers and syndicators focus on the basic arrangements for dividing syndication revenues, the duration of the syndication rights, the territory where the program may be sold, and any cash advances. A syndicator operates by contacting stations individually and, if enough stations are willing to buy a particular program, then the off-network show feasibly can go into syndication. The price a station pays for a syndicated show is largely dependent on the station's market size. In recent years, local stations in New York and Los Angeles have paid as much as $90,000 per episode for a syndicated program. Typically, syndicators keep 30% to 40% of the syndication revenues as their fee. Out of this, they pay their operating expenses, which normally include only the costs of distributing the program and the residuals fees that must be paid to actors.

7. The financial interest and syndication rules place several constraints on how the networks may behave in the process described above. The *financial interest* rule provides that no network shall:

> . . . acquire any financial or proprietary right or interest in the exhibition,

> distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network . . . .

The *syndication rule* provides that no network shall:

> . . . sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as "syndication" within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States; or reserve any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution . . . .

Under the rules, a network can only purchase the rights from a producer to air a program over the network's distribution system. In the absence of the rules, the networks could negotiate for a financial interest and participation in syndication rights. For programs wholly produced by the networks, the rule requires that, if the program is to be syndicated, the networks must sell their syndication rights to others.

8. The *Notice* in this proceeding questioned whether these rules could reasonably be expected to promote their intended goals of television program and outlet diversity. Comment was also sought on whether the rules were necessary in today's video marketplace given the emergence of various competitive electronic media.

9. In response to the *Notice*, more than 120 formal written comments were received, many containing detailed economic studies on the functioning of the rules and the markets affected by them. The preparation of these comments was facilitated by unusually long comment and reply comment periods. In addition to the written comments, oral proceedings were held at which 40 parties argued their positions to the Commission.

Summary of Tentative Decision and Request for Further Comments

10. Our own review of the rules and the responses to the *Notice* in this proceeding have persuaded us that the rules are in need of very substantial revision. While the continuation of some measure of regulatory control relating to the licensing and use of off-network programming does appear to be appropriate, it does not appear that the financial interest rule is either necessary or desirable. A detailed review of the analysis leading to these conclusions is set forth in the *Discussion* and *Conclusion* sections of this document. However, at this point we will provide a brief overview of the changes we are undertaking.

11. First, it does not appear that it is necessary to control the ability of the networks to bargain for and acquire passive "financial

interests" in programs purchased or produced for network exhibition.

12. Second, we will continue to prohibit network participation in the domestic syndication of prime time entertainment program series. Thus, the scope of the syndication prohibition would be narrowed to include only participation in *domestic* syndication markets and to cover only *prime time series* programs (as defined below) rather than all types of programming.

13. Third, programming in which a network retained any continuing off-network "financial interest," would in every case have to be made available for syndicated sale within six months after the end of the network exhibition "run." Moreover, for series that run for more than five years, the network would have to make the series available for syndication no later than the end of the fifth year of the network exhibition. We also believe that it may be appropriate to "sunset" the syndication restrictions that are maintained, in 1990, unless the Commission makes an affirmative public interest finding that they should continue in effect.

14. In short, our tentative decision is to eliminate the financial interest rule while narrowing the syndication rule to ensure against possible network incentives to restrict the availability of the most critical off-network programming for independent television station use. While financial and syndication rights are not unrelated, it is not uncommon in the entertainment world to separate passive profit sharing interests from interests that involve active management control and we see no reason why a similar type of separation cannot be used effectively to further our objectives here. It appears from the record that the other restraints of the rules were either initially misguided or are no longer necessary in light of evolving market conditions and we intend to eliminate them. However, we will herein seek additional comments to fine tune the syndication prohibition of the rules, to ensure that it provides appropriate protections but does not unnecessarily interfere with the conduct of normal negotiations between networks and producers. While the basic elements of these alternative forms of regulation have been set forth as options in a number of the comments received, and thus have already been the subject of some discussion, we believe replies focused more specifically on the attached rules would be useful.

Historical Background of the Rules

15. In 1959 the Commission instituted an investigatory proceeding designed to obtain information relating "to the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of

programs for television exhibition . . . ." *Order for Investigatory Proceeding, Docket 12782*, 24 Fed. Reg. 1605.[1] Based on the results of this inquiry, the Commission issued a *Notice of Proposed Rule Making* in 1965 which proposed adoption of rules designed to correct a perceived competitive imbalance in the program production and distribution industries. *Competition and Responsibility in Network Television Broadcasting*, 45 F.C.C. 2146. In that *Notice* the Commission stated:

> The information and data before the Commission appear to establish that network corporations, with the acquiesence of their affiliates, have adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television, but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs. *Id.* at 2147.

The original purposes of the proposed rules were to provide an opportunity for the entry of more competitive elements into the market for television programs for network exhibition and to encourage the growth of alternate sources of television programs for both network and non-network exhibition. *Id.*

16. The Commission stated that the undue concentration of control in the three networks over television programs was inherently undesirable because diversification of economic interests and power in this area was a cardinal principle of the public interest standard found in the Communications Act. Concentration also decreased the competitive opportunity for independent program producers and the syndication industry, the success of which was considered vital to the further development of the television service, especially UHF stations. Finally, the Commission found the networks' acquisition of financial interests and syndication rights a conflict of interest. The Commission reasoned that networks would be guided in their programming decisions more by their attainment of such interests in the programming than their objective judgments as to whether the programs were likely to serve the public interest. *Id.* at 2157. The Commission stated that the presence of networks as domestic syndicators was inherently undesirable because they were in the position of selling programs to independent stations that directly competed with the networks' affiliates.

17. Based on these concerns, the Commission adopted the

[1] A detailed review of the Commission's continuing interest in networking can be found in the following reports issued by the Network Inquiry Special Staff in Docket 21049: *The Historical Evolution of the Commercial Network Broadcast System Leading to Adoption of the Prime Time Access Rule, the Financial Interest Rule, and the Syndication Rule*, Dockets 12782 and 19622 (October 1979); and, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (October 1980) (hereafter, Network Inquiry Staff Report).

financial interest and syndication rules in 1970. *Report and Order in Docket 12782*, 23 FCC 2d 382 (1970).[2] According to the Commission's statements in the *Order* affirming the financial interest and syndication rules on reconsideration, the regulations had two principal purposes: to lessen the bargaining power of the networks, and to remove the possibility that acquisition of subsidiary financial and syndication rights would become a prerequisite to network exhibition. 25 F.C.C.2d 318, 331 (1970). The Commission expressed its opinion that the rules would greatly enhance independent producers' abilities to operate in the network television program market and would also remove the possibility of networks taking advantage of their relationships with affiliates in their syndication dealings. *Id.* The Commission concluded that the rules would tend to improve the bargaining positions of producers with networks so as to bring about a desirable degree of expansion of stable and viable program sources. *Id.* at 332. On appeal the rules were sustained by the U.S. Court of Appeals for the Second Circuit in *Mt. Mansfield Television, Inc. v. F.C.C.*, 442 F.2d 470 (2nd Cir. 1971)

18. In 1972 the United States Department of Justice filed antitrust suits against the three networks, asserting that:[3]

> (a) ownership and control of television entertainment programs broadcast during prime time hours were concentrated among the three networks;
>
> (b) competition in the production, distribution, and sale of television entertainment programs, including feature films, had been unreasonably restrained;
>
> (c) competition in the sale of television entertainment programs to the three networks by outside suppliers had been unreasonably restrained; and,
>
> (d) the viewing public had been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

NBC entered into a consent decree with the Department of Justice in 1978 and ABC and CBS entered into similar consent decrees in 1980.[4]

19. These consent decrees, which are currently in effect, impose restraints on network practices that both include and surpass the restrictions imposed by the Commission's syndication and financial interest rules. For example, while both the rules and the consent decrees permit foreign syndication of programs wholly produced by a

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[2] At the same time, the Commission adopted the prime time access rule, 47 C.F.R. §73.658 (k), which limits the amount of network programming that can be broadcast during prime time in the top 50 markets.

[3] The suits were dismissed on procedural grounds but were refiled in 1974.

[4] *United States v. National Broadcasting Co.*, 449 F.Supp. 1127 (C.D. Cal. 1978), *aff'd mem.* No. 77–3381 (9th Cir. April 12, 1978), *cert. denied sub nom. CBS v. U.S. District Court for Central Division of Calif.*, 48 U.S.L.W. 3186 (1979); *United States v. CBS, Inc.*, Civ. No. 74–3599-RJK (C.D. Cal. July 31, 1980), *reprinted in* 45 Fed. Reg. 34465, *United States v. ABC, Inc.*, Civil No. 74–3600 (C.D. Cal.), *reprinted in* 45 Fed. Reg. 58441.

network, the consent decrees impose a requirement not contained in the Commission's rule for foreign syndication of foreign-produced programs: that the foreign syndication rights must be obtained in negotiations separate from those for domestic syndication licensing.[5] Similarly, whereas both the rules and consent decrees permit acquisition of non-broadcast rights, the consent decrees permit acquisition of such rights only when negotiated separately from those for a broadcast license.[6]

20. In 1977, the Commission instituted its latest network inquiry. *Commercial Television Network Practices*, 62 F.C.C. 2d 548 (*Notice of Inquiry* 1977). The inquiry was intended to focus specifically on the relationships between networks and affiliate stations to consider the extent to which licensee programming discretion was being subverted by the networks. A concommitant issue under consideration was whether networks had maintained anti-competitive policies which had unduly restricted the development of programming sources. 62 F.C.C. 2d at 548–49. In a *Further Notice of Inquiry* adopted the next year, the Commission summarized its concerns in the following manner:

> First, in judging the performance of the industry, we are primarily concerned with "protecting the interest of the public in receiving the best possible programming service . . . ." The economic well-being of networks, stations or program suppliers is, thus, important only to the extent that it affects their ability to serve the public. Second, while a wide variety of specific practices is identified for analysis, we are centrally concerned about whether these practices enable the existing major commercial networks, in their relations with affiliates and program suppliers, to limit the opportunities for others to compete for station broadcast time and thereby exert an anti-competitive influence upon the industry's behavior. *Further Notice of Inquiry*, 69 F.C.C. 2d 1524, 1528 (1978).

The Commission also expanded the scope of the inquiry to include an examination of the structure of the television industry and the extent to which structural remedies might be applied to ease the pressures created by the three network system of program procurement and distribution.

21. After extensive research and analysis, the Network Inquiry Special Staff made several findings which are at odds with many of the assumptions used by the Commission to justify the financial interest and syndication rules. The staff disagreed with the Commission's conclusions regarding concentration in the program supply market and argued that the market for first-run and off-network

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[5] Although the language of the syndication rule is somewhat vague, the Commission has subsequently indicated that the rule was not intended to cover the acquisition of foreign-produced programs for foreign distribution. *Memorandum Opinion and Order*, 26 F.C.C. 2d 28, 31 n.3 (1970).

[6] The Commission explicity found that non-broadcast interests could be acquired irrespective of whether acquired in separate negotiations. Memorandum Opinion and Order, 87 F.C.C. 2d 30, 35 (1981), *petition for review denied sub nom., Viacom Int'l v. F.C.C.*, 672 F.2d 1034 (2d Cir. 1982]).

syndicated programming is now and was competitively structured at the time the rules were adopted in 1970. The staff also argued that the financial interest and syndication rules might well be disrupting an efficient risk-sharing arrangement between the networks and their program suppliers. Based on its analysis of the network/supplier relationship, the staff concluded that the licensing of various program property rights such financial interests and syndication rights provides a method for producers to share the risk of unsuccessful series with the networks. Networks provided higher program development and production fees to producers when the networks had a share in after-market profits. With the rules in place, network fees to producers were reduced, thus forcing the producer to shoulder a greater financial risk initially. The staff observed that this might in fact lead to more concentration in the program production industry as small independent producers unable to absorb the greater risks are forced to merge with larger, more financially sound, producers.[7]

22. The Commission has never expressly endorsed or rejected the conclusions or recommendations of the Network Inquiry Special Staff. However, having noted the staff's conclusions that the rules were not necessary when adopted and could not possibly deter the practices they were designed to reach, we instituted the present rule making proceeding in June 1982, in order to evaluate the special staff's conclusions. Of equal import, we asked whether changes in market conditions over the past decade may have obviated the need for the financial interest and syndication rules. In this regard we noted:

> Our professed goals of protecting licensees from the exercise of anticompetitive network practices and fostering a healthy independent production industry were established during a period when the gateway to presentation of television programming virtually required use of over-the-air facilities. The Commission became concerned when the acquisition of programming became centralized in the hands of only the three major television networks. However, the market for television programming has undergone significant change since adoption of the syndication and financial interest rule. Over the past few years, the rate of technological change in television program service has increased in a fashion which could not have been anticipated by us a decade ago. In addition the pace appears to be increasing with no peak in sight. Therefore, our concern over the abilities of the networks to act as monopsonists in the purchase of television programming may no longer be justified. *Notice* at para. 32.

23. Moreover, the *Notice* asked whether the rules are appropriate mechanisms to accomplish their stated goals. We solicited comments on whether producers, who are themselves powerful actors in today's program marketplace are in need of protection from the exercise of undue influence by the networks. More fundamental-

[7] For a detailed report of the special staff's findings, see "An Analysis of Television Program Production, Acquisition and Distribution," at page 293 of Volume II of Network Inquiry Staff Report.

ly, we questioned whether protection of program producers from undue influence is an appropriate subject for Commission concern. In situations where the program producer is not so large or influential, we asked whether the rules created any reasonable balance in the bargaining positions of the parties. In more general terms, we also asked parties to provide their insights into the network/program producer relationship and how the rules affect that relationship. Next, we noted that, because other media were not restricted by the financial interest and syndication rules in their dealings with producers, those entities may have a competitive advantage over the networks in their dealings with program producers. We also requested that commenters address the issue of how deletion of the rules might affect independent television stations, since networks acting as syndicators of off-network programming would be in the position of selling that programming to their direct competitors. Finally, we sought comments on the relationship between the financial interest and syndication rules and the network consent decrees.

II. *COMMENT SUMMARY*

24. This section contains a summary of the major facts and arguments contained in the comments. It is not intended to set forth every idea or notion conveyed in the comments, although every formal and informal comment was considered fully. The comment summary is divided into seven segments, each dealing with a separate aspect of the rules: (1) The effect of the rules on the production industry; (2) The effect of the rules on television broadcast stations; (3) Effects on advertising costs; (4) The effect of the rules on the networks; (5) The effect on new television networks; (6) Alternative regulatory proposals; and (7) Additional issues. Within each grouping, the arguments favoring repeal are presented first.

25. Before beginning this summary, it may be helpful to generally describe the traditional broadcast video industry in terms of its program sources. The industry is divided into two broad classes of stations: network affiliates and independents. Network affiliates are those stations that have a contractual relationship with one of the three national television networks (ABC, NBC and CBS) and serve as the local distributors of the programming obtained by the networks from their original producers. Currently, network provided programming makes up about 70% of the average affiliate's broadcast day, and virtually 100% of prime time (8–11 p.m. ET, Monday - Saturday and 7–11 p.m. ET, Sunday). While stations may preempt the network programming in favor of their own, this is rarely done. For example, the average ABC affiliate clears close to 99% of the network's shows, regardless of day-part. During those day-parts when the networks are not feeding programming to their affiliates,

typically 71;2 hours a day, the stations must either originate their own shows or purchase programs directly from program suppliers (syndicators).

26. Independent television stations broadcast programming that is either locally originated or obtained directly from program suppliers. The vast majority of independents today (116 out of 179) air general programming consisting of news, sports, movies, programs previously shown on the networks (called off-network syndicated series), and first-run programming specifically created for the syndication market. Forty-two independent stations are "specialty stations" which broadcast foreign language or religious programming aimed at a small segment of the audience. Another 21 independents are subscription television (STV) operations, at least part of whose programming is only available via subscription.

27. Prime time entertainment series programming accounts for 23% of the network schedule, 50% of its advertising revenues and 30% of its profits. It is also the major source of off-network syndicated programming. Following the network run (generally two showings of each episode), these programs may become the product available for purchase by individual stations in the syndication market. The amount of this off-network programming used by independent stations varies. Estimates range from 22% of their programming time for Turner Broadcasting, 30-35% for Taft Broadcasting and 59% for Metromedia. Off-network syndicated series are the principal type of programming aired by independents during the 4-8 p.m. ET day-part, which is considered independents' peak time. During this time, the independent station is programming opposite news and non-network programming on network affiliated stations. According to one commenter, this time period may account for as much as 60% of an independent's revenues, although the average is approximately 50%.

Effects of the Rules on the Production Industry

28. *Arguments for Repeal.* Proponents of repeal argue that the rules were unnecessary to equalize the bargaining power of networks and producers. Although, the Commission believed that the networks had monopsony power, the Network Inquiry Special Staff (NISS) found that the program supply market was in fact competitive prior to the rules' adoption. However, CBS presents data indicating that before the rules were adopted, networks acquired financial interests and syndication rights on a fully competitive basis. An empirical study conducted by Robert Crandall concludes that payments for such rights were made in the form of higher license fees, and the payments approximated the full market value of the rights. The National Telecommuncations Information Agency (NTIA) asserts that there is not historical evidence (i.e., pre-1970) that the networks took advantage of their market position.

29. NBC and ABC state that even if networks had monopsony power when the rules were promulgated, the changed marketplace has rendered the rules obsolete. Studies are submitted by CBS showing that the share of the three networks in total program expenditures dropped from 74% to almost 54% in the past decade. NBC further states that the rules clearly decrease competition in the program supply market by making small producers dependent on major Hollywood studios, their competitors, for needed financing. CBS presents data indicating the number of producers supplying prime time entertainment programming to the networks has fallen from 60 to 41 between 1969 and 1981. Further, the CBS data show that the market share for the major suppliers has increased and caused the disappearance of many small producers. The National Black Media Coalition believes the rules have led to a dwindling number of program suppliers who dislike competition and exclude minority independent producers. The ABC affiliates association suggests that, to the extent competition and program diversity exist, the prime time access rule, and not the financial interest and syndication rules, is responsible.

30. The networks contend that the rules have no relation to bargaining power. Financial interests in programming and syndication rights are merely financial terms over which the parties must bargain. Program selection does not turn on the resolution of one particular financial term. Renegotiation becomes almost continuous after the first season's exhibition. Thus, suppliers are not bound to terms negotiated at the early development stages of production, and once a show becomes a hit, producers are in a much better bargaining position. Also, the networks insist that they make programming decisions on the basis of program quality and audience appeal rather than whether they have a financial interest in the program. ABC presents a study which determines that over the past decade network program costs have risen faster than network advertising revenues. This increase in cost cannot be explained by a corresponding increase in producer input costs. ABC states that an important characteristic of the monopsonist is the ability to control its cost—the ability to extract economic rents from its suppliers. The networks obviously have not been able to do this. Thus, program producers have substantial bargaining power.

31. The Department of Justice states that any market power the networks have derives from the market structure. Regulation of one element in the bargaining process will simply cause the networks to shift their focus to other parts of the bargaining process. The networks also allege that the rules make program supply less efficient. They argue that the sale of syndication rights by program producers is an efficient risk sharing arrangement. Prohibiting this risk sharing raises the cost of programming, reduces total invest-

ment in program production, and may reduce diversity by encouraging excessive production of "tried and true" program types.

32. CBS states that the rules force suppliers who wish to sell financial interests or syndication rights to operate in a market artifically narrowed by the exclusion of three major purchasers. This results in reduced efficiency, competition, and diversity in the supply of network programming. The networks argue that they are particularly well suited to bear risk for three reasons: they each finance a large number of programs; since they also schedule their programs, they can take account of inter-program externalities (audience spillover, etc.); and, they can promote programs efficiently over time by coordinating the network and off-network runs. Thus, the program rights are worth more to the networks than to other parties. The Department of Justice and NTIA agree and argue that repeal of the rule would shift the risks to more efficient risk-bearing entities, that is, the networks. Alfred Kahn asserts that ultimately the public is harmed if private markets are not free to work efficiently.

33. CBS argues that the networks must participate in decisions on program content. The networks' participation in program development is an inseparable part of the networks' role. Networks are participants in the creative process, not merely gatekeepers. NTIA agrees, stating that the networks already have ultimate or final control over the nature of the programs they purchase for broadcast. As a licensee and with a responsibility to its affiliates, each network properly oversees the content of each program.

34. *Arguments for Retention.* Opponents of repeal contend that this proceeding is premised on faulty analyses by the Network Inquiry Special Staff and a misunderstanding of the entire program production distribution exhibition market. The central argument of those who support retention of the financial interest and syndication rules centers on the proposition that the networks now possess and will maintain substantial market power in the foreseeable future. Taft Broadcasting reminds the Commission that the Department of Justice only three years ago finalized proceedings in which the networks were found to engage in anticompetitive activity. Taft finds no change in the marketplace since then that justifies the current proceeding. Similarly, the Association of Program Distributors (APD) states that there has been no demonstration that the networks or the public have suffered under the rules. APD contends that changing the rules on the basis of abstract economic theory such as that supplied by the NISS, rather than demonstrated injury, is unfair. Cox Communications agrees and states that the network inquiry staff's conclusions were based on a misreading of the FCC's objectives and a disregard of the factual record.

35. The Committee for Prudent Deregulation (CPD), a coalition of producers, syndicators, independent television stations, artists and

others, states that repeal of the rules would limit diversity of programming sources by weakening or eliminating television program producers. CPD supports the Commission's original determination that the networks used their oligopsonistic positions to extract valuable concessions from program producers including profit shares and syndication rights. The Caucus for Producers, Writers and Directors (The Caucus) indicates that prior to the rules the networks had a financial interest in 93% of all exhibited programs and syndication rights in all popular shows. CPD states that there are more independent producers now than before the rules, and, as a result, the program supply market is healthier and more competitive. Prior to the rules the networks paid producers enough to remain in business but it was not necessarily an amount sufficient to allow producers to remain fully independent. According to Embassy Communications and Tandem Productions, the rules have achieved success in making the production industry more vital and independent as well as competitive. The Motion Picture Association of America (MPAA) states that there would be no risk of concentration in the production industry if the rules were retained. MPAA contends that few barriers currently exist to entry in the production industry, but that there would be few incentives to enter the business if the networks took control.

36. The opponents of repeal state that the producer is most vulnerable at the program development stage of production where the networks' leverage is the greatest. According to The Caucus, networks consistently force producers to violate their contracts with the craft unions with respect to creative control over a program. Moreover, the license fee provided by the networks is almost never enough to cover the production cost of the program. MCA maintains that existing network payments do not reflect true value but are the lowest payment level at which producers will produce. For the most part, producers must realize any profits from a program through syndication sales which often occur several years after production.

37. If the rules are repealed, the commenters argue that the networks will use their monopsony power against producers. Supporters of the existing rules argue that the networks provide the sole market for first-run series, and the three networks act as one when purchasing programs. Thus, the networks can pay low prices and force producers to cede valuable rights as the *quid pro quo* of every network license. This will reduce the profitability of program production, and limit access to the business.

38. Several commenters admit there may be some economies due to more efficient risk sharing and the elimination of transactions costs, but suggest that those savings are likely to be relatively small. They not that no party has provided any empirical evidence whatsoever on the size of the presumed economies. The commenters also argue that advance financing by the network is not necessary. A

commitment by a network to exhibit a proposed show is a "bankable item" that is itself sufficient to allow a producer to obtain conventional financing. CPD states that the risk-sharing inefficiency created by the rule may not be significant where producers have other means of sharing the risks of production. CPD states that the major studios and large independent producers can engage in risk-pooling. For instance, the NISS Report points out that where the probability of financial loss is assumed to be 50 percent on a single program, it falls to approximately three percent if five statistically independent programs are pooled. Independent producers can pool risk through joint ventures. ICF Incorporated, in a report commissioned by CPD, states that the number of producers of prime time programs declined from the mid-1960's until 1974/75 and increased thereafter. Similarly, concentration measured either by Herfindahl indices or the leading firms' combined market shares generally increased until 1974/75 and declined thereafter. Thus, since there is no strong evidence that risk-aversion by program suppliers exists, it is doubtful that the rules have much effect on risk-sharing efficiency.

39. In response to arguments that the rules merely shift income among major producers on one hand and the three networks on the other, The Caucus insists that this is not a battle of corporate giants. Rather, repeal would have serious effects on small, independent producers and distributors, which, in turn, would adversely affect the public interest in diversity. According to the National Association of Independent Television Producers and Distributors (NAITPD), the rules do not effectuate merely a reallocation of rents. Instead, the major achievement of the rules has been the creation of a new class of producers and distributors who are the primary sources of first-run syndicated material and who represent the only competition to the major studios in off-network syndication programming and financing new productions. These new companies account for approximately one half of the top twenty prime time entertainment series, and, according to NAITPD, are dependent on the financial interest and syndication rules for survival. From the buyer's standpoint, the National Institute for Low Power Television sees significant differences between dealing with producers on the one hand and the networks on the other. In negotiating with producers, price is the major issue; with the networks, certain anticompetitive considerations are always present.

40. With respect to the rules' effects on the creative process, members of The Caucus aver that repeal would strengthen network influence. They contend that program quality decreases as network influence increases, and this record of interference will not improve if the networks get even more power. The role of the networks is to make a profit; the role of the producer is to make a profit plus deliver a message. Repeal of the rules will eliminate both roles for the independent producer. Lorimar contends that a producer's ability to

create diverse and original programming is largely a direct result of the financial interest and syndication rules. The National Association of Black Owned Broadcasters agrees and states that repeal would grant inordinate control to the networks and decrease any chance for the development of specific programs that appeal to minority audiences. CPD states that in the past the networks have engaged in imitative programming and scheduling, and that repeal will result in more common denominator shows with tried and true formulas. This, in turn, will force producers to turn to other media.

41. *Replies.* In reply comments, CBS reiterates its contention that the rules have diminished television program diversity. According to CBS, the rules have led to increased concentration in program supply and have discouraged the production of innovative, risky programming. NBC adds that the ban on network acquisition of profit shares does not promote more suppliers, more diversity, or more creativity. The network further contends that the issue of relative bargaining strength between the parties is irrelevant. The Department of Justice states that the rules do not promote competition or diversity in the program production market. The program production market is already competitive, and the networks themselves, as the three gatekeepers of network programming, determine the diversity of prime time programming.

42. The United Church of Christ, *et. al.* (UCC) contends that repeal of the rules based on pure speculation would be disruptive and contrary to the public interest. UCC states that the present competitive program production environment is largely attributable to the success of the rules. The Association of Program Distributors echoes this thought by stating that the rules succeeded in halting the networks' concentration of control of program content thereby retaining and enlarging program markets for new competitors. Paramount adds that the rules do not provide anticompetitive advantages to large production companies. There is substantial competition among suppliers of entertainment programs, and independent producers supply 50% of the prime time viewing hours. APD attests to the fact that the rules encourage program diversity by noting that the mere pendency of the present rulemaking is affecting financing for new product. Syndicators are reluctant to commit funds to new projects with the future of the rules in doubt. On the issue of bargaining power, Paramount states that the networks can and do require major creative and financial concessions. According to Paramount, no producer has the power to resist these demands, which appear in license agreements as non-negotiable, boilerplate provisions.

43. With respect to the risk-sharing issue, the Department of Justice states that the efficiency losses imposed by the rules are not large. DOJ contends that the major studios may in fact be more efficient risk bearers than the networks due to their ability to engage

in "hedging", that is, spreading their risks by placing programs on all three networks. DOJ also points to the fact that shows selected for a network run readily attract capital as further evidence that the rules cause little efficiency losses. Paramount adds that when major production companies join with independent producers, both parties do so willingly through fair bargaining. This would not be the case if the networks were allowed to take financial interests. APD concludes that the risk-sharing problem is the major cost cited to justify repeal, but that all small producers are eager to assume those risks without network involvement. Cox adds that even if the rules create certain inefficiencies, the benefits of the rules—diversity and a healthy independent television industry—justify their continued existence.

Effects of the Rules on Television Broadcast Stations

44. *Arguments for Repeal.* Proponents of repeal state that the rules decrease the number of potential syndicators and thereby limit competition in syndication. This, asserts NBC, is harmful not only to stations purchasing syndicated programming, but also to small suppliers lacking distribution arms and to the public. According to NBC, there never were any abuses which required networks to be barred from syndication, and there is no need to do so today because the market is competitively structured. CBS adds that before the rules were adopted the three broadcast networks obtained syndication rights in only a small percentage of the programs broadcast, and it is unlikely that they could again ever achieve that level.

45. In an appendix to the CBS comment, William J. Baumol states that the rules adversely affect television stations affiliated with the networks and firms that purchase advertising time in conjunction with the networks' television broadcasts. Making the networks less efficient suppliers of broadcast material weakens the position of the affiliates, and offers advertisers a less efficient medium. The ABC Affiliates Association expands this line of reasoning by stating that the rules discourage networks from producing creative, high-risk programming. This undermines programming quality and diverts network resources to the production of programming for less encumbered media services. The Association contends that the rules act as an incentive for the networks to bypass local broadcast affiliates and encourage the migration of high quality programming from free over-the-air television to pay distribution systems. Gateway Communications states that stations were treated more fairly by syndicators before the rules. According to Gateway, small stations are currently shut out by syndicators, who sell almost exclusively to large group operators.

46. Those supporting repeal state that there was no history of affiliate favoritism in the networks' conduct of the syndication business before the rules were in place. They argue that independent

stations are the best syndication customers, and that discriminating against independent stations therefore would be bad business judgment. Withholding product from the independent stations would provide slim, if any, benefits; only a fraction of the audience diverted from independent stations would tune to the networks. The networks contend warehousing syndicated programs would be an unsound business practice that might result in civil liability to other profit participants in a program. Also, many syndication contracts call for guaranteed profits; such agreements are clearly inconsistent with warehousing practices. Warehousing is only efficient if the revenues from withholding programs are greater than the syndication revenues, which is unlikely. In fact, NBC claims that buyers have many alternative sources of similar programming, and that the loss of revenues through warehousing would be enormous.

47. Alfred Kahn opines that the networks probably have some incentive to withhold programming from independent stations, or charge them more for it than they otherwise would, because they are in competition for audiences. But the three networks are not a single entity, and they compete intensely for programming. The networks did not gain dominant control over syndication rights before the rules went into effect, but they might attempt to secure control over syndication of the programs they purchase if the rules were removed, since the syndication market has grown in importance. According to Kahn, however, the following considerations argue against the expectation that the networks would achieve monopoly power in the offer of programs to independent stations: the networks' failure to acquire syndication rights from large producers; their small share of domestic off-network syndication rights previous to the rule; the availability of substitutes for off-network programs; the fact that exercise of monopoly power would depend upon either collusion or consciously parallel policies; the fact that the syndication market is very valuable and that the interests and abilities of the networks vary greatly; and the evidence that the networks did not tend to give programs to their affiliates rather than to others. Kahn states that it may be time to turn the surveillance of this industry's conduct over entirely to the jurisdiction of the antitrust laws.

48. The Department of Justice states that a network monopolist holding syndication rights might reduce the supply of off-network programs to broadcasters and thus raise broadcast license fees or advertising rates. Consumer harm would result from substitution of less desirable programming. Whether this potential abuse warrants regulatory restriction depends on the likelihood that the networks could coordinate their actions and whether a rule would reduce competitive problems without causing inefficiencies. DOJ states that the networks may be able to collude since the industry is highly concentrated, barriers to entry are high, and cheating would be easy

to detect. The data relied on in 1970 may not predict network behavior today, since the value of syndicated programs was smaller, the growth of independent stations may have changed the networks' incentives, and syndicated programming may not have constituted a separate market. New video distribution technology may not reduce the market power of the networks. The Department states that the rules cause efficiency losses and should be eliminated, but that the Commission should consider adopting a narrow rule designed to address the potential harm to the off-network syndication market if this can be done without reducing efficiency in program production and distribution. DOJ concludes that the antitrust laws should not be relied upon to ensure against anticompetitive network practices.

49. *Arguments for Retention.* Parties favoring retention of the financial interest and syndication rules aver that, because of the rules, the market for the purchase of off-network programs is competitive. Metromedia states that there can be no public interest justification for allowing the networks to gobble up the syndication/independent station sector of the television industry. It would be contrary to the public interest to take any action that would reduce the number of sellers in the off-network syndication market, particularly when the only remaining sellers would be three dominant networks with a history of conscious parallelism. Turner Broadcasting submits that if the rules are repealed, the networks will have the power to dominate the syndication business. They have bottleneck control of the initial years of a series' broadcast; they can rely on owned and operated stations (O&Os) as buyers of last resort; they can amortize program costs across a guaranteed audience; they have the power to raise their national advertising rates as necessary; and they can spread costs over their vast broadcast empire. Viacom International adds that if the rules were repealed, network O&O stations would purchase their syndicated programming from the network. Independent producers and syndicators would be severely disadvantaged if they were unable to syndicate their programs to the network O&Os.

50. The Committee for Prudent Deregulation asserts that repeal of the rules would be detrimental to independent television stations because it would place control of a vital source of their programming in the hands of their dominant competitors. Programming is the most important element in the success of any television station. Independent stations are the most significant source of competition to the major networks and their affiliates. The Association of Independent Television Stations (INTV) states that the growth of independent stations is due in part to access to recent off-network syndicated programs, and continued access to such programming is essential to permit further development. Metromedia presents figures showing that off-network programming comprises 51 to 78 percent of its stations' broadcast schedules.

51. INTV argues that the networks have a strong incentive to withhold programming that may attract audience to their competitors. If the Commission repeals the rules it will fortify the networks' supremacy over emerging services, and will retard the development of independent stations. The networks could favor their owned and affiliated outlets in a variety of undetectable ways, and they have more incentive to use their power today than in 1970. If the networks withheld or delayed syndication of the most popular network series, independent station schedules would be weakened and the quantity and quality of free program choices would be reduced. The independent stations would also lose their principal source of revenue and the financial ability to acquire high-quality first-run material. The prospects for the creation of a fourth network would disappear. The National Council of Churches/United Church of Christ posit that the rules have important non-economic objectives. They eliminate conflicts of interest in network scheduling and syndication sales to competitiors. Repeal of the rules would result in less desirable program choices for the public, less credible competition for the networks, higher advertising prices, and higher consumer prices.

52. ICF Incorporated posits four scenarios in which the networks might maximize revenues and weaken independent stations, assuming that unshown but available programs restrain the prices of more popular ones. In the first model all off-network programs are controlled by a single firm, and the sole supplier could make unshown programs unavailable so they could ensure that they would no longer limit the prices charged for the more popular programs. Station program choices would not change but program prices would increase. In the second model, programs are supplied by a dominant firm and a competitive fringe. If the program that constrains prices is owned by one of the small suppliers, then the dominant firm might increase its profits by removing from syndication programming that would otherwise be shown. The program owned by a fringe would then replace the deleted program and another program would become the best unshown program. If there is a significant difference between the value of the two programs, then prices of all programs that are sold can be raised significantly. The dominant firm loses the revenue from the program it withdraws, but gains additional revenue on each program it continues to sell.

53. In the third model, the supplier is integrated into broadcasting and earns revenues from television advertising. Under some conditions, increases in the firm's advertising rates will increase the prices at which it can sell off-network programs. In the fourth model, the integrated supplier raises off-network program prices higher than would a non-integrated firm. Independent stations would be unable to earn a profit by showing the same set of programs, so they will offer programming that attracts fewer viewers, reduce broadcast

hours, or cease operation altogether. Advertising prices would rise, and the revenues lost from selling fewer programs would be offset by higher advertising revenues. An integrated supplier is more likely than an unintegrated one to reduce the hours of programming independents offer because its affiliated stations gain viewers and can charge higher advertising rates. Television viewers will have fewer viewing options; advertisers would pay higher rates; and consumers would pay more for advertised products.

54. ICF examines the conditions underlying these models and provides evidence on several points: recent off-network program prices will not be constrained by other types of programming if the rules are repealed. The value of the stock of older programs will rapidly decrease over time, and first-run syndication and theatrical movies are imperfect substitutes for off-network programs. Independent behavior by the networks could lead to a restriction of off-network program availability, and coordinated behavior is likely. The networks have stronger incentives and more ability than other owners of off-network programs to restrict supply, and they could achieve substantial gains from acquiring market power in off-network programming. Networks did not attempt to seize market power prior to adoption of the rules because: the independent stations were unprofitable; they had a smaller share of viewers and advertising revenues; and the networks were under intense scrutiny. A significant risk exists that repeal of the rules would lead to elevation of off-network program prices, and the magnitude of the effects could run in the hundreds of millions of dollars per annum.

55. Opponents of repeal also insist that warehousing is a very real concern. INTV quotes network statements indicating that repeal of the rules will retard the "premature" syndication of hit shows. INTV interprets these remarks as an intent to delay the availability of programs that still have significant network run appeal. Metromedia, noting the importance of made for television movies, believes that networks would warehouse such movies for repeated network exhibition and would never syndicate such features.

56. *Replies.* In reply comments ABC notes that the top 15 syndicators control 75.6% of the syndication market. ABC avers that the addition of the networks as domestic syndicators would contribute to the competitiveness of the syndication business. The ABC Television Affiliates Association suggests that independent station support for the rules takes the short view. Rather a reduction in the production of high-quality network programming will ultimately affect independent stations due to their heavy reliance on off-network fare. Several commenters reject the notion that the growth of the independent stations is somehow related to the financial interest and syndication rules. NBC, for example, states that the growth of the independent stations relates primarily to the general

upturn in the economy beginning in 1976, the reduction in the UHF handicap, and the lessening of advertiser bias against independent stations.

57. Much of the reply comments were devoted to the issue of warehousing, which several parties contend is the sole issue seriously in contention. The proponents of repeal attack the warehousing scenario by asserting that none of the conditions necessary for warehousing to work would be satisfied. First, the networks would not acquire a dominant share of syndication rights. In this regard, NBC submits a study showing that if the networks began acquiring syndication rights at the same rate as they did before the rules, the networks would have a combined 14% share of the off-network universe in ten years and a 20% share by the year 2000. Second, the networks and their supporters contest the assumption that recent off-network entertainment series constitute a relevant economic market. NTIA states that various first-run programs, older off-network series, and children's programming show the same ratings success as many new off-network series. NBC adds that if marginal syndicated product is withheld, many fungible substitutes are available. Third, the networks state that collusion is not possible. Fourth, according to CBS, the networks have no incentive to monopolize off-network programming to harm independent stations and raise advertising prices. The heavist use of off-network programming by independent stations is during the 4-8 p.m. period. Because this is a little-used period for network programming, the networks have no incentive to weaken independent stations during this daypart. The ABC Television Affiliate Association states that warehousing will not occur because it would hurt affiliates outside the top 50 markets who use off-network programming during the access period (generally 7-8 p.m. E.T.).

58. NAITPD states that the television industry will be harmed if networks are allowed to enter the syndication market because the small distributor will be forced out of business. This will adversely affect price competition and will leave the networks and major production houses free to set prices. The Association of Program Distributors avers that the networks could use their power to control the syndication market by obtaining syndication rights to off-network programs and attracting first-run syndication programming by offering financing and guaranteed clearances through the O&O's and affiliates. Independent distributors could not compete with such power and would eventually be forced out of business.

59. Westinghouse states that the syndication rule is needed more now than when adopted. Deletion of the rule would adversely affect affiliates that preempt network feeds with other sources of programs. Westinghouse asserts that the networks' access to off-network product, their unique delivery systems, and their affiliate systems would quickly threaten the competitive syndication market.

Permitting networks to syndicate would also allow them indirectly to circumvent the prime time access rule; networks could program the access period with first-run syndication programming. Accordingly, Westinghouse views the syndication rule as a necessary corollary to the prime time access rule.

60. On the issue of warehousing, Citizens Communication Center (CCC) contends that warehousing could be profitable when increased audience shares outweigh the loss in syndication revenues. Second, withholding only a small amount of programming would be enough to decrease supply and raise prices. Third, the alleged duty to other profit participants to maximize syndication profits would be irrelevant if the networks owned a 100% interest. Furthermore, litigation by other profit participants would be lengthy and expensive; damages would be speculative and hard to prove. Also, damages may be less than warehousing gains. Finally, CCC states that warehousing does not require collusion but can result from parallel behavior.

61. NAITPD asserts that neither antitrust remedies nor DOJ enforcement can replace the FCC as a guardian of the public interest in broadcasting. Antitrust remedies are largely corrective, whereas FCC policies are intended affirmatively to promote the public interest. Taft and Paramount both take issue with characterizing the problem as "warehousing." Paramount contends that warehousing is unlikely only because such an extreme measure would be unnecessary to achieve the networks' anticompetitive purpose. Delays in release would be almost as effective and would make FCC oversight or antitrust enforcement virtually impossible. Taft concludes that the issues is not warehousing but control of the market.

62. In its reply comments, the Department of Justice reiterates its view that the only issue of concern in this rule making involves the effects of repeal on the syndication market. DOJ argues that the networks could control the syndication rights to enough programs to make withholding a profitable strategy, although network coordination of withholding would be difficult. DOJ also states that networks have the incentive to warehouse, and that the antitrust laws may not be effective enforcement devices. DOJ concludes that a limited syndication rule is advisable to minimize the potential adverse effects of the rules' repeal.[8]

Effects of the Rules on Advertising Costs[9]

63. The parties supporting retention of the rules assert that, if the rules are repealed, the advertisers and consumers of advertised products would suffer due to increased advertising rates. The

[8] DOJ's proposed syndication rule as well as other compromise solutions offered by the commenters, is summarized in a later section of this document.

[9] This issue was first raised by the opponents of repeal in the initial comments. Therefore, the positions of those favoring repeal were presented in the replies.

Association of National Advertisers believes that recision of the rule is clearly premature. Deleting the rules at this time would create a significant risk of further concentrating the television ad market when more competition is beginning to emerge. According to the commenters' analysis, advertising "inventory" value is determined by the audience that is garnered by a station for a particular program. CPD claims that the financial interest and syndication rules ensure programming availability to independent stations. These stations, therefore, have an advertising inventory that increases competition for the advertising dollar and holds advertising costs down. Both CPD and the Association of National Advertisers supply data purporting to show that the cost of advertising per 1000 viewers is 20-60% lower in markets with strong independent stations.

64. If the rules are repealed, however, networks will have the ability to restrict supply of recent programming, thereby decreasing the strength of independent stations. This decrease in independent station audience shares and the concomitant increase in network shares would allow the network affiliates to raise advertising rates. CPD states that the networks could also raise advertising rates by reducing the amount of advertising time available. Without strong independent stations to absorb advertiser demand, the networks and their affiliates alone will reap the benefits of higher advertising rates. If, on the other hand, independent stations can absorb advertiser demand and thus obtain increased revenues, the networks would be able to recapture a portion of those revenues by raising the prices of off-network programming. Polygram's Norman Horowitz adds that if networks actively engage in syndication, they would probably offer many series on a "barter" basis. This would enlarge network control of availabilities and give the networks further power to influence rates.

65. Finally, according to those parties addressing this issue, in the field of advertising there is really no comparable substitute for television exposure. Accordingly, a strong independent television service is the only identifiable entity capable of restraining the network's power to influence advertising rates.

66. In response to the charges that repeal of the rules would adversely affect advertising rates, both CBS and DOJ indicate that there is no evidence that advertisements shown during the 4:00 to 8:00 p.m. time period constitute an economic market. DOJ continues that if advertisers have reasonable substitutes for the 4:00 to 8:00 p.m. exposures, advertising rates cannot be affected by reducing such exposures. Also, because the 4:00 to 8:00 p.m. time period is not heavily programmed by the networks, DOJ suggests that the real benefit of reducing availabilities in that time period would accrue only to the network owned and operated stations.

67. The Federal Trade Commission (FTC) states that the models

used to predict harm to ad rates are based on assumptions that the networks will collude: on the purchase of rights to programs; in the distribution of off-network series to the independent stations; and in the determination of advertising rates. The FTC concludes that collusion in these three areas is highly unlikely. The FTC also notes that the ICF and ANA studies attribute changes in advertising cost per thousand (CPM) to a single factor, number of viewers delivered, but that cost also depends upon the demographic composition of the viewers, the expected number of viewers for future showings and the degree of uncertainty associated with each of these measurements. Further, a new study cited by the FTC suggests that neither lower market share for independent stations nor a reduction in the number of independents would enable networks to collude on the price of advertisements. Thus, the FTC concludes that the contention that a reduction in the competitive position of independent stations would permit networks to estabish monopsonistic advertising rates is not supported either by empirical evidence or economic analysis. With regard to barter transactions, CBS opines that networks would simply be participating in an existing syndication practice.

68. In support of the position that repeal of the rules will lead to higher advertising prices, General Mills states that competition is the single most important factor in establishing ad prices. The rules provide independent stations a continuous supply of programs that attract viewers and enable stations to compete for advertising dollars. General Mills presents data comparing network advertising prices, spot market prices, and the Consumer Price Index (CPI). These figures show that the network advertising CPM is significantly higher than the spot market CPM due to less competition. Network power to control ad prices is evidenced by 1983–84 advertising price increases ranging 15–22% higher than last year's prices, which were 13–16% higher than the year before. These increases are significantly higher than the increases in the CPI.

Effects of the Rules on Television Networks

69. *Arguments for Repeal.* The networks claim that their composite net audience share currently is declining and that projections indicate that net share will decline an additional 10–20 points by 1990. Between 1985 and 1990, program expenditures by cable television and subscription services will exceed the combined network programming expenditure. Thus, the new delivery systems are expanding and enhancing the opportunities for program suppliers. Given this situation, the networks and their affiliates argue it is fundamentally unfair to put them at a uniquely disadvantaged competitive position vis-a-vis emerging video technologies. They argue that repeal of the rules is of critical importance so the networks will be able to compete with the ever-burgeoning new purchasers of programming. Many of these new purchasers are pay

services that can outbid the networks for programming that would otherwise be shown on "free" TV. The American Legal Foundation contends that this situation eliminates programming options available to viewers unable to afford pay television. The NBC Affiliates indicate that repeal would contribute to the restoration of economic balance between the networks and the pay television industry. This is important in order to encourage the continuation of free TV, which serves the public interest by providing diversity, competition to pay services, public affairs programming, and greater opportunities for minority actors and producers.

70. NBC asserts that the rules discourage network production of high quality shows because they cannot achieve the program's full value due to their inability to engage in syndication. Television syndication is as important in amortizing programming developed initially for the new technologies as first-run network programs. Along the same lines, NTIA states that the networks need to be able to share non-network revenues generated through exploitation of subsidary rights in order to pay the high prices prime time programming demands. Shooshan and Jackson contend that the rules make the weakest network more averse to taking a risk on innovative or different programming, because it cannot reap the benefits of a successful gamble through syndication. The NBC Affiliates Association claims that this negative aspect of the rules, could filter down to affiliates and affect their economic health, especially in the network compensation area.

71. *Arguments for Retention.* The opponents of repeal see no imminent threat to network dominance. They quote network executives' speeches indicating that the networks will dominate the industry well into the 1990's. The Inter-Guild Council points out that even though network shares are predicted to decrease, the total network audience will increase due to growth in the number of television households. Golden West posits that the networks are enjoying unprecedented prosperity: the control over affiliate time is growing and there have been significant increases in network profits.

72. The opponents state that new technologies are not sufficiently powerful as yet to minimize the networks' oligopsonistic position.[10] Lorimar states that the networks are the only entities capable of high penetration and nationwide distribution, and the new media offer no adequate alternative to network coverage. Cox asserts that cable television penetration is currently around 35% of television

[10] The Department of Justice states that networks may continue to be the primary source of syndicatable programming because the attractiveness of programming produced by the new distribution services is as yet undetermined. DOJ also cites the CBS study that predicts network dominance through 1990. Thus, DOJ contends that it is unclear whether new technologies will reduce substantially network market power.

households and is expected to increase to 50–60% by 1990, but audience shares for pay cable are expected to be only 9% by 1990. Cox contrasts these figures to the networks and their affiliates which reach virtually every television household. According to NAITPD, the new technologies have provided mostly advances in hardware rather than competitive video software. The network loss in shares has been primarily to the independent television stations, not to new technologies. With respect to the advertising perspective, the ANA states that competition from the alternative media is more illusory than real. Recent figures show that ad-supported cable obtained a 3% share of the television advertising market and 1.7% of total television ad revenues. ANA points to the recent failure of ad-supported cable networks and states that the future of such offerings is most uncertain.

73. Both MCA and the Association of Program Distributors point out the new technologies are not a dominant force in the acquisition of entertainment series programming. According to the APD, the new media are not competing for network-type entertainment programming, but they are outbidding the networks for theatrical movies and sporting events. Since such programs have no significant syndication value, the financial interest and syndication rules are essentially irrelevant. Thus the argument that free television is being harmed somehow by the rules is misleading and erroneous.

74. Parties in favor of retaining the rules indicate that the rules have not crippled the networks but are sound structural devices to restrain the overriding power of the networks. Cox states that network participation in the new technologies is in no way restricted by the financial interest and syndication rules, which only apply to broadcast rights. In fact, the networks are participating fully in new technologies. The FCC is already facilitating this process by proposing elimination of the cable/network cross ownership rules, granting waivers, and allowing networks to seek licenses in new areas such as DBS. INTV suggests that the networks are currently reinvesting their profits in new technologies instead of public interest broadcast services. The Association of Program Distributors concludes that the primary benefit of rescinding the rules would be to eliminate the largely conjectural disadvantages suffered by the three most highly favored licensees in 50 years of Commission history.

75. *Replies.* In its reply comments, Shooshan and Jackson aver that the rules are written so broadly that they create a series of unintended and unnecessary harms which deny viewing options to the American public. They recommend at the very least that networks be permitted to engage in the following activities: syndication of first-run programming; syndication of off-network programming carried initially on other networks; foreign syndication of off-network programming carried initially on other networks; foreign syndication; syndication of non-series and special interest program-

ming; and syndication of older off-network programming. The network O&O's should also be permitted to syndicate.

76. The reply comments from those parties supporting retention of the rules focus on the allegations that the rules place the networks at a competitive disadvantage. NAITPD alleges that it is also unfair that no other entities can engage in television networking to the extent of the existing three commercial networks. Citizens Communications Center states that the rules do not threaten the financial viability of the networks and, by inference, free television. Syndication rights are investment decisions, not financial panaceas. CCC points out that the networks have alternative investment opportunities available to them, and that they are in fact actively investing in the new technologies.

77. The Department of Justice again takes the position that the new technologies alone do not justify repeal of the rules at present. According to DOJ, it is unclear how much new product produced for the new media will be good substitutes for off-network programming. Further, the ability of pay services to compete for sports, movies and specials is irrelevant to this proceeding; such programs are not generally suitable for syndication in the 4–8 p.m. time period. DOJ asserts that the disadvantages cited by the networks with respect to bidding for sports and movies are the result of differences between pay and ad-supported television, not the rules. DOJ concludes that the networks are not competitively disadvantaged by virtue of the financial interest and syndication rules.

Effects of Rules on New Television Networks

78. Shooshan and Jackson suggest the rules have the unexpected effect of restricting potentially desirable "hybrid" ventures. These hybrid networks could take the form of several broadcast stations and a cable network. Such problems could not have been foreseen when the rules were initiated, but potential networks must consider the rules and plan around the regulatory constraints.

79. Taft Broadcasting states that the rules allow entities as small as Taft to begin to compete with the networks; however, the oligopsony force of the networks has restricted Taft's potential program production and distribution of its own programming. In support, the Bolter Study states that the three dominant networks could outbid any emerging network for the best programming thereby ensuring the demise or surely hampering the growth of nascent networks. Therefore, the rules should be retained for the major networks but not for others because they do not have the economic power wielded by the big three.

Alternative Regulatory Proposals

80. In the initial comments, during the oral presentations, and in the reply comments several parties suggested various compro-

mises whereby the rules would neither be completely retained nor completely deleted. The major compromise proposals and the comments engendered by them are described below.

81. *Forced sale of syndication interests in prime time series programs.* Under this option, which would apply only to the three major commercial networks, no restrictions would be placed on a network's ability to acquire and hold financial interests in programs shown over the network. Networks would also be allowed to acquire syndication rights to any program and would be permitted to syndicate those programs during the network run. However, the networks would be required to divest themselves of the syndication rights to a program in a one-time sale without legal restrictions to a third party no later than a fixed time after the end of the network run. The period between cancellation of the network run and the forced sale would be no longer than necessary to enable the networks to sell the syndication rights efficiently. By its terms, this forced sale would apply only to domestic television broadcast distribution rights of prime time entertainment series for non-network exhibition. The rule would not apply to off-network programs from any other dayparts, to network-produced first-run syndicated programming, or to made-for-TV movies.

82. DOJ explains that the networks would be unable to warehouse programs following the network run, but any risk-sharing inefficiencies created by the present rule would be eliminated. The rule would permit the networks to capture any increase in program values created by network efforts and would give the networks incentives to invest in and promote programs nearer to their optimal levels. Finally, the rule would be self-executing. Any attempt by the networks to control any term of domestic program distribution after the network run would violate the rule.

83. Commenters note that the forced sale option increases transaction costs since it would force the networks to undertake negotiations to sell program rights that might not be undertaken in the absence of the rule. DOJ responds that these costs would not be large, because the syndication market is preexisting and competitive, and this type of sale occurs continuously today. Commenters also contend that the sale might incur certain costs because the networks might be more efficient syndicators than those to whom the rights could be sold. DOJ contends that these losses would be small because there is no reason to believe that the networks would be more efficient syndicators than the firms now in the business. The FTC, however, submits that these efficiency costs may not be small.

84. ICF states that the networks could use the forced sale to their advantage by bundling the sale of programs to a few select syndicators. Together with the networks, these few syndicators could behave anticompetitively. DOJ responds that the networks have no incentive to create an oligopoly in syndication rights because this

oligopoly could turn against the networks. ICF also contends that the forced sale would have to be closely supervised by DOJ and the FCC if it is to work properly. Further, the time period set for the forced sale would be crucial: if it is too short it represents little change from the existing rule; if it is too long it provides inadequate protection from warehousing. The forced sale could also create inefficiencies in network decision-making. For example, if the networks have to divest themselves of syndication rights after the network run, the networks might not be able to enter into multi-year syndication contracts during the first run. Finally, ICF concludes that the networks should also be forced to sell their financial interests in order to prevent anticompetitive behavior. DOJ contends that the networks could not act anticompetitively in this area without detection. Further, because there is no ready market for the transfer of financial interests, transaction costs might be substantial.

85. *Limited partnership type interests.* Westinghouse points out that the financial interest rule affects networks' dealings with producers while the syndication rule affects the network-station relationship and stations' abilities to make independent programming judgments. The Network Inquiry Report did not address the rules' effects on local stations; therefore, the NISS report may be a basis for reviewing the financial interest rule, but not the syndication rule. Based on this analysis, Westinghouse offers a compromise rule which would allow networks to obtain a passive (noncontrolling) or limited partnership financial interest in network programming. However, networks would not be permitted to have any control over syndication. In setting a limit on the amount of financial interest that a network could acquire, the following guidelines are offered: The extent of network participation must not constitute presumptive or *de facto* control; and, the syndicator must have a sufficient economic incentive to participate aggressively as an independent force.

86. Westinghouse states that this rule would reduce the risk-sharing inefficiency of the existing rule and allow networks to earn a return for the risks they incur in program development and production. Also, the bar against network syndication prevents warehousing and insulates the networks from any so-called "conflict of interest" situations. The rule is also workable from the FCC's standpoint, and it focuses the Commission's responsibilities on protecting the public's interest in receiving television service from diverse, independent sources.

87. Other commenting parties express some reservation about the Westinghouse proposal. Some commenters suggest that "control" should be defined in terms of a percentage limitation on the network's allowable financial interest. Capital Cities suggests that the networks safely could have between a 20% to 40% ownership interest without obtaining control, but further comment should be

solicited on this issue. The FTC opines that effectively precluding control may not be so easy and will require "artful" drafting. DOJ asserts that limiting a network's financial interest would prevent the networks from taking advantage of vertical efficiencies. Further, enforcement costs would be high in reviewing the multiplicity of ownership interests that might develop.

88. Some commenters oppose this approach entirely. The Association of National Advertisers states that a compromise anti-warehousing rule would not be adequate. ANA believes that some anticompetitive activities could be accomplished if the networks acquired any level of financial interest. Network influence over the distributors might still be substantial and virtually undetectable. Taft asserts that networks would have access to syndication records which might give them information about competing stations' schedules. This would provide the networks with a substantial program planning advantage. The networks would also know what competitors paid for programming. This would permit network 0&0's to undercut other stations's advertising rates. Taft concludes that allowing networks to obtain a profit share would lead to network pressure on when and how a particular program could be syndicated.

89. *Graduated Ownership Proposal.* During the oral presentation, Commissioner Quello distributed copies of a compromise rule and sought comments on the proposal. The proposal would permit the networks to acquire a significant, but variable percentage of financial interests in network programs. The percentage of interests that could be acquired would be tied to the combined audience ratings of the three networks. As audience ratings declined, indicating less network market power, the percentage of interests that the networks could acquire would increase.

90. ICF contends that conceptually this proposal is the best compromise solution because it allows the networks in, but slowly, as market conditions evolve. This option deals with only the financial interest portion of the rules. Because the syndication rule would be left intact, concerns over warehousing and conflicts of interest in off-network program distribution would be satisfied. ICF also suggests, however, that networks are likely to influence syndication if they have *any* financial interest in a program. This could lead to warehousing problems. DOJ states that it would be appropriate to link entry of the networks into this market with a decline in their market power. DOJ contends, however, that changes in network market share or network audience rating will not accurately predict changes in network market power with respect to warehousing. Network market share may be irrelevant to syndicated off-network programming if the changes in market share are based on viewing shifts to movies, sports, or specials. Both DOJ and ICF suggest that such a rule would entail high enforcement costs in drafting a workable formula and then measuring and applying it. Taft states

that this option is overly complex. ICF recommends that, if this proposal is adopted, the Commission should set a specific level and periodically review its adequacy rather than try to devise a sliding scale. ABC concludes that this option still hinders efficient risk sharing and that no valid reasons have been advanced to interfere with the bargaining process between the networks and program producers.

91. *"Use or lose" proposal.* Storer suggests that the financial interest rule be dropped entirely and that the syndication rule be replaced with a narrowly drawn rule designed to prevent warehousing. Under this rule, any syndication rights in programs not produced entirely by the networks, must be exercised within a stated term of years or revert back to the owner of the program. Storer asserts that an appropriate date for the "use or lose" decision might be three years from the first network exhibition of the program. The proposal eliminates any inefficiencies inherent in the financial interest rule yet prevents warehousing. Further, the rule would be closely monitored by those entities trying to regain thc syndication rights. DOJ and the FTC assert, however, that it would be very difficult for the FCC to determine whether the networks have in fact aggressively attempted to syndicate the programming. Further, treatment of syndication in selected markets and questions of reversions in others would complicate its enforcement.

92. *Percent of programs limit.* Dr. Fisher, an economic consultant to CBS, proposed a compromise version of the rules that would permit networks to own unlimited financial interest and syndication rights in a limited number of programs. Fisher proposes that the networks be allowed to obtain such rights in 60% of programs for all three networks combined or 20% of programs for each network individually. Should these limits be exceeded, the networks would be required to sell the rights to some programs. In order to monitor this rule, the networks would be required to submit periodic reports detailing the rights and interests held by them. Because networks would be able to participate fully in a fixed percentage of programming, the risk-sharing inefficiencies would be reduced. Similarly, the possibility of successfully warehousing programs would be minimized.

93. ICF argues that allowing any concentration of syndication rights in the networks would be unhealthy since it could lead to anticompetitive behavior. DOJ asserts that this option would entail significant enforcement costs. The FCC would have to to determine and then enforce the relevant universe of programs to which the limitations apply and the percentage of these programs that the networks could control. DOJ, ICF, and the FTC all note that the networks could circumvent the rules' intent by disposing of rights in shows that turn out to be unattractive in order to buy a greater percentage of rights in new programs.

94. *Dominant/Non-dominant Network Proposal.* According to this proposal, the rules would be retained in their entirety, but would be applied only to CBS, NBC, and ABC. Turner recommends that a test for defining market power should include elements measuring the scope of service and the number, health, and relative size of the companies in network competition. Operationally, at least for the present, this proposal is similar to those offered by several other commenters. For example, although the Spanish International Network takes no position on the merits of the financial interest and syndication rules, it states that if the rules are retained, they should expressly apply only to the three major commercial networks. PBS reminds the Commission that it currently is exempt from the rules and that the Commission, in fashioning some alternative formulation of the rule, should not omit that exemption. Although supporting deletion of the rules entirely, Henry Geller and Donna Lampert state that, at the very least, the rules should be revised so as not to include new, emerging networks. Restricting the rule in this way would not hamper the creation of new broadcast or "hybrid" networks but would continue to restrain the dominant big three.

95. Although citing potential harms to emerging networks as an adverse effect of the rules, Shooshan and Jackson contend that Turner's analogy to dominant/non-dominant carriers is inappropriate. According to Shooshan & Jackson, occasional, *ad hoc* networks provide substantial competition to the major networks. This competition eliminates the bottleneck in program networking. Additionally, Shooshan and Jackson find no substantial barriers to engaging in this type of *ad hoc* networking. They reason that it therefore makes no sense to classify any firm as dominant in an industry where short-term, *ad hoc* competition is a real threat.

96. With respect to all the various compromise proposals offered by the commenters, CPD states that any new formulation must meet several important objectives. First, it must prevent network control over syndication. Second, this must be accomplished without significant enforcement or compliance costs. Third, there must be no significant costs in terms of economic efficiency. And fourth, the rules must be carefully drawn to avoid overbreadth. CPD also urges the Commission to weigh any transition costs inherent in modifying the rules against any benefits that might accrue from the changes. CPD concludes that after a consideration of all these factors, the existing rules remain the most effective and efficient.

Additional Issues

97. On April 21, 1983, the Office of Communication of the United Church of Christ, the Communications Commission of the National Council of the Churches of Christ in the U.S.A., and Paulist Productions filed a Petition for Further Notice of Proposed Rule Making. The parties allege that a Further Notice is necessary

because all interested parties have not been afforded equal opportunity to address "vague and nonspecific regulatory alternatives" which "appear to go beyond those contemplated by the Commission in initiating this proceeding." UCC *et al.* accordingly request that a Further Notice be issued to seek comments on proposed options for repeal, modification, or retention of the financial interest and syndication rules and to solicit additional options as well. The petition exhaustively documents various media articles and statements by Commissioners relating to compromise solutions to this proceeding. UCC contends that, by not specifically addressing these compromises and soliciting comment thereon, the Commission is depriving many parties from meaningfully participating. Accordingly, the Commission may be violating the Administrative Procedure Act and its own rules which may lead to "unpleasant litigation at best, and reversal at worst." UCC concludes that such problems," . . . and the consequential delay, expense and loss of public confidence can be avoided by the simple expedient of soliciting further comments."

98. In response, NBC argues that the original *Notice* in fact sought comments on appropriate modifications to the financial interest and syndication rules and that the *Notice* was not cast in "all or nothing" terms. NBC then lists a number of commenters who specifically forwarded and analyzed potential compromise positions in their initial comments. NBC further argues that the APA requires only a notice containing "either the terms of or substance of the proposed rule or a description of the subjects and issues involved." Citing *California Citizens Band Association v. United States*, 375 F. 2d 43, 48 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967), NBC asserts that the APA does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule. Hence, NBC concludes that the requirements of the APA have been met in this case and that the issuance of a Further Notice is neither necessary nor desirable.

99. In their reply comments, Henry Geller and Donna Lampert allege that, while the procedures being followed by the Commission are basically fair, the Commission is committing significant procedural error by labeling, for *ex parte* purposes, this proceeding as "non-restricted". Because this rule making, in the commenters' judgments, involves "competing claims to a valuable privilege", the proceeding, under the Commission's rules, must be considered restricted. Geller and Lampert suggest that this violation of the Commission's own rules could be corrected merely by eliminating the present restricted/non-restricted dichotomy in the Commission's rules and b conducting all proceedings under the non-restricted procedures. According to Geller and Lampert, the non-restricted procedures are fair and could be applied to all informal rule makings. However, until the Commission does change its *ex parte*

procedures, it is bound by its rules. The present rules state that *ex parte* contacts are not permitted in rule making proceedings involving competing claims to a valuable privilege. Thus, the Commission is not complying with its own rules in this proceeding. The commenters note that, since the *ex parte* provisions are procedural rules, they could be amended immediately without seeking public comment.

III. *DISCUSSION*

Legal and Policy Context of the Rules

100. This proceeding encompasses important issues relating to competition, diversity and efficiency in the production and distribution of television programming. There does not generally seem to be any disagreement among the parties to this proceeding that these important goals must guide our decision on whether to retain, modify or eliminate the financial interest and syndication rules. What is disputed is how various market practices and regulatory policies further or hinder the achievement of these goals and what weight should be given to each goal in situations where they may be contradictory. A discussion of these legal and policy issues will clarify the criteria used in reaching our tentative decision in this proceeding.

101. As a general matter, the Commission is guided in its decision making by the Communications Act of 1934, as amended. As is well known, the Act mandates that the Commission promote the public interest, convenience and necessity, but it does not define with any degree of precision the meaning of this direction. Rather, the Commission, subject to oversight by the Courts, has been traditionally afforded a considerable measure of discretion to formulate precise standards based on the objectives of the Act. In particularizing the public interest in adopting the financial interest and syndication rules, the Commission relied primarily on concepts of diversity and competition.

102. That the Commission should foster diversity in broadcasting is a concept that flows from the First Amendment and has been recognized in decisions of the Commission dating back to its creation. The Supreme Court has stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . " *Associated Press v. U.S.*, 326 U.S. 1, 20 (1943). Commission decisions of all types have relied heavily on this concept. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965); *Newspaper/Broadcast Cross-Ownership*, 50 FCC 2d 1046 (1975); *Great Lakes Broadcasting Co.* 3 F.R.C. Ann. Rep. 32, 34 (1929), *rev'd. on other grounds*, 37 F. 2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930); *Editorializing by Broadcast Licensees*, 13 FCC 2d

1246 (1949); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, Gen. Docket No. 82–797, 48 Fed. Reg. 5976 (February 9, 1983).

103. The desire to increase the diversity of programming sources available to the public has been one of the reasons the Commission has moved aggressively in recent years to eliminate policies and modify rules that limit the possiblity of diversity being made available to the public. *See e.g., Cable Television Distant Signal and Syndicated Exclusivity Rules*, 79 FCC 2d 663 (1980) *aff'd sub nom. Malrite T.V. of New York v. FCC*, 652 F. 2d 1140 (2nd Cir. 1981) *cert. denied* 102 S. Ct. 1002 (1982) (eliminating certain restrictions on cable television operations); *Subscription Television Service*, 90 FCC 2d 341 (1982) (increasing the availability of broadcast subscription television service); *Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982) (authorizing operation of direct broadcast satellite stations); *Low Power Television Service*, 51 RR 2d 476 (1982) (authorizing low power television service); *Report and Order in Docket 80–90*, FCC 83–229 (May 26, 1983) (authorizing the licensing of additional FM radio broadcast stations); and *Report and Order in Gen. Docket 80–112*, FCC 82–243 (May 26, 1983) (authorizing multichannel multipoint distribution service stations).

104. The concept of diversity as it has been applied to the regulation of network broadcasting has been described as embodying two concepts—source diversity, which is a measure of the number of program originators, and outlet diversity, which is a measure of the number of independent transmission systems delivering programming to the public.[11]

105. In adopting the rules here in question the Commission used as its justification these long held and often repeated diversity increasing goals and it is therefore appropriate that in re-evaluating the rules we judge them again in terms of their impact on the program diversity.

106. The second stated objective of the rules—and test for their reexamination—is their effect in fostering competition. It has long been recognized that the field of broadcasting is intended to be a competitive one. The Supreme Court has stated that " . . . the Act recognizes that the field of broadcasting is one of free competition." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). The well known formulation is that "This Commission, although not charged with the duty of enforcing that law (Sherman Act) should administer its regulatory powers with respect to broadcasting in light of the purposes which the Sherman Act was designed to achieve." *N.B.C v. U.S.*, 63 S. Ct. 997, 1013 (1943). The Court of appeals has held that

[11] Program diversity, measured by the number of actual program categories or types offered is also a relevant measure from the point of view of the public. However, it generally has not been a direct focus of Commission actions due to the necessity of our avoiding direct involvement in programming decisions.

"Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws." *Mansfield Journal v. FCC*, 180 F. 2d 28, 33 (D.C. Cir. 1950). Thus, a critical question in re-evaluating these rules is their effect on competition.

107. The Communications Act also charges the Commission in its regulatory activities, to act so as to develop a communications system that is "rapid," "efficient," and provides service at "reasonable charges." In the context of the present proceeding, this requires that regulations adopted or continued not impose undue costs or unreasonably interfere with the efficient conduct of business, and, at the same time, that private restraints on competition not interfere with the competitive spur that keeps businesses efficient and costs reasonable. In general, this suggests that the Commission should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.*, does not impose greater costs than the evil it is intended to remedy. Although a consideration of the costs imposed is implicit in every decision to impose or continue regulations, in recent years greater emphasis has been placed on identifying those costs and we believe that is particularly appropriate in this proceeding.

Economic Context of the Rules—the Video Industry

108. At the time the financial interest and syndication rules were adopted, in 1970, there were 59 million television households. Television programming was distributed by over-the-air, conventional broadcast TV and cable television. At that time, there were 690 commercial broadcast TV stations operating. Table 1 classifies those stations by channel assignment type and by status as network affiliates or independents.

Table 1
Commercial TV Stations-1970

	Total	*VHF*	*UHF*
All Stations	690	508	182
Affiliates	600	477	123
Independents[12]	90	31	59

In 1970, the average TV home received 6.8 broadcast stations. Network stations received the overwhelming preponderance of the TV viewing audience, about 90%. Independent stations attracted approximately a 9% share of the television audience. At that time, the networks had revenues of $1.1 billion, the affiliates (including

[12] Independent stations were located in 43 of the nation's approximately 200 TV markets and served about 50% of all TV households.

those owned by the networks) had revenues of $1.4 billion and the independents received revenue of $200 million. As Table 2 shows, the networks earned $50 million and their affiliates (including the network O & O's) were profitable with income totaling approximately $400 million. The independents, as a whole, lost over $20 million, although the average VHF independent was profitable.

Table 2
Financial Data-1970[13]
($ million)

	No. of Stations	*Revenue*	*Income*
Networks		1,144.6	50.1
Network O&O's	15	312.5	117.3
Affiliates	585	1,136.8	307.2
VHF	462	1,059.2	312.6
UHF	123	77.6	(5.4)
Independents	90	214.3	(20.8)
VHF	31	167.4	19.3
UHF	59	46.9	(40.1)

109. Cable television, in 1970, was principally a retransmission technology. It was a means of either distributing signals from nearby broadcast TV stations to areas where reception was poor or importing more distant stations' signals for areas where few local stations existed. At that time, there were 2,490 cable systems serving 4.5 million TV households.

110. In the production industry, there were 60 producers who created 93 prime time entertainment series for the networks for the 1969-70 season.[14] The top 4 firms held a 32.6% share of total programming hours with the top producer representing a 12.8% share. The top 8 firms created 46.3% of the total program hours and the top 20 production companies represented 68.4% of the market, in terms of hours of programming aired.[15] In 1968, the syndication

[13] Television Broadcast Financial Data - 1970.

[14] Network Inquiry Staff Report, p. 571.

[15] CBS and CPD submitted similar estimates for the concentration of the production industry. (Source: CBS, Vol. I, Appendix I, CPD, ICF, Vol. 2, pp. 109, 133, 215, 216.)

	CBS	*CPD*
No. of producers	61	61
No. of programs	94	75
Top Firm	15.2%	12.7%
Top 4 Firms	35.9%	35.6%
Top 8 Firms	48.7%	48.7%
Top 20 Firms	69.8%	62.6%

industry was made up of 17 syndicators who distributed 67 off-network programs according to the NISS.[16] The top 4 syndicators had a 63.9% share of all off-network programming hours, with the top firm representing almost half this amount (30.9%). The leading 8 distributors of off-network series accounted for 87.9% of all such programming hours.[17] In 1967 network sales of off-network television series in domestic and foreign syndication was $26.1 million, at a time when total sales of off-network series were $100 million.[18]

111. Since 1970, two basic types of changes have taken place in the video industry. First, the older distribution technologies have shown significant growth. Second, new technologies have entered the marketplace. Table 3 shows the growth of broadcast and cable television over this period.

Table 3
Growth of Broadcast and Cable TV[19]

	1970	*1975*	*1980*	*1983*
TV Households (millions)	59	70	78	83
Commercial TV Stations	690	711	746	802
Affiliates	600	625	626	623
VHF	477	483	487	501
UHF	123	142	139	122
Independents	90	86	120	179
VHF	31	30	30	25
UHF	59	56	90	154
Cable Television				
No. of Systems	2,490	3,506	4,225	4,825
Homes Passed (millions)	9	20	35	45
Basic Subs. (millions)	4.5	9.8	16.0	28
Pay Subs. (millions)		.05	9	23

112. The average TV household now receives 9.8 signals, an increase of 3 (44%) since 1970. The growth in the number of UHF stations, many of which are independents, has been a significant factor in this increase. As more independents have become available

[16] *An Analysis of Television Program Production, Acquisition and Distribution*, Preliminary Report, Network Inquiry Special Staff, Federal Communications Commission, June 1980, Table F-28 and F-29.

[17] CPD has made its own estimates of these same quantities. Its data list 20 distributors for the 1968-69 season with the top firm having a 13% share of program hours and the top 4 firms accounting for 48.8% of this market. The top 8 distributors represented 73.9% of the market, in terms of program hours. (ICF, Vol. 3, pp. 168, 177, 239, 240).

[18] *Report and Order in Docket 12782*, 23 FCC 2d 393 (1970).

[19] Source: *Television Factbook*, Services Volume 50, 1981-82, pp. 75-a, 83-a, *Cablevision*, April 11, 1983, p. 69. According to the latest Commission count, there were 844 commercial TV stations. FCC news release, June 16, 1983.

to viewers, their total share of viewing has grown relative to the networks.[20] The percent of homes passed by cable increased from 15.3% in 1970 to 54.2% in 1983. In 1982, the networks share of the television audience had fallen from 90% to approximately 80%, while independents and other over-the-air TV stations achieved a 17% share. It is also apparent from Table 4 that the independents have improved financially over this period. In 1980, the last year for which financial data are available, affiliates (including the network O & O's) had total income of approximately $1.2 billion on revenues close to $4 billion. In that year, both the average VHF and UHF independent stations were profitable. These stations had a total income of nearly $160 million and revenues of more than $900 million.

Table 4
Comparative Broadcast Financial Data[21]
($ millions)

	1970		*1975*		*1980*	
	Revenue	*Income*	*Revenue*	*Income*	*Revenue*	*Income*
Networks	1,144.6	50.1	1,673.8	208.5	3,865.2	325.6
Network O&O's	312.5	117.3	395.6	105.7	700.3	208.5
Affiliates	1,136.8	307.2	1,677.0	438.1	3,311.4	960.4
VHF	1,059.2	312.6	1,534.4	432.0	3,006.6	944.3
UHF	77.6	(5.4)	142.6	6.1	304.8	16.1
Independents	214.3	(20.8)	347.8	28.0	930.8	159.1
VHF	167.4	(19.3)	227.8	24.2	545.4	135.5
UHF	46.9	(40.1)	120.0	3.8	585.4	23.6

113. Since 1970, cable television has become much more than a means of distributing broadcast signals. Aided by the lauch of communications satellites and the removal of several restrictions on the operation of earth stations, a wide variety of cable networks has come into being since the mid-1970's.[22] Many of these networks are highly specialized, offering only news, sports, children's or cultural programs. Of the 34 basic service networks, 23 are advertiser-supported, including 3 independent stations, WTBS, WGN and WOR, which are distributed nationally via satellite and cable and often called superstations. Another 11 networks are supported directly or indirectly by subscriber fees. Cable systems also carry pay-cable channels in addition to the basic programming. The 17 currently available pay networks include movie channels, adult entertainment and regional sports channels. The largest pay cable networks are HBO and Showtime, which began principally as movie channels but have expanded their offerings to include original programming. The

[20] There are currently 86 different TV markets with independent stations, accounting for 78% of all TV households.

[21] Source: Television Broadcast Financial Data, years as cited.

[22] As indicated on Table 3, currently cable systems pass 45 million homes, have 28 million basic subscribers, and have 23 million pay subscribers.

complete list of operating and proposed cable networks is extensive.[23] Table 5 lists examples of each type of cable channel.

Table 5
Examples of Cable Networks[24]

	No. of Systems	*No of Subs. (millions)*[25]
Advertiser-supported		
WTBS	4,293	23.3
ESPN (sports)	4,055	18.8
CBN (religious, family)	3,050	18.2
Subscriber-supported		
C-SPAN (public affairs)	1,000	10.5
Nickelodeon (children's)	1,725	9.0
PTL (religious, general)	600	6.5
Pay Cable		
HBO (movies, specials)	3,600	11.0
Showtime (movies, specials)	1,500	3.5
The Movie Channel (movies)	2,150	2.2

114. The rapid growth of cable in recent years (see Table 3) is also evident from its increasing revenues. As shown in Table 6, total cable industry operating income was $1.2 billion for 1981 on operating revenues of $3.6 billion. Pay cable revenues were $1.2 billion.

Table 6
Cable Television Financial Data[26]
($ billions)

	1977	*1979*	*1981*
Operating revenues	1.2	1.8	3.6
Pay cable revenues	0.2 (1978)	0.35	1.2
Ad revenues[27]	4.9	5.0	13.0
Operating income	0.5	0.7	1.2

115. Several new technologies have also become participants in the distribution of video programming. Subscription television consists of a scrambled broadcast signal available only to subscribers with decoders. That technology has grown to serve 1.4 million homes in 25 markets while it had only 20,000 subscribers at the end of 1977. Multi-point Distribution Service (MDS) is a pay service delivered to

[23] See, for example, ICF, Vol. 1, Appendix 2, pp. 14-15, 25, CBS, Vol. I, Appendices D, E, H, NBC, pp. 30-33, 47; 49.

[24] Source: NBC, pp. 30-33, ICF, Vol. 2, Appendix 2, Exhibit 4, *Cablevision*, August 16, 1982, p. 70.

[25] For the advertiser and subscriber services, the number of subscribers is calculated as the number of homes where the network is available. For the pay channels, that number is the actual subscriber count.

[26] Source: FCC Cable Television Industry Financial Data Annual Reports.

[27] These data represent advertising revenues paid directly to cable systems and do not include the advertising revenues of the cable networks.

consumers via a microwave signal. MDS licensees are regulated as common carriers. The first MDS service became available in 1974. There are approximately 500,000 MDS subscribers at present. The satellite master antenna system (SMATV) is primarily available to multiple dwelling units since it uses antenna systems (including satellite earth stations installed on buildings) to gather programming which is then fed to the building's occupants by cable. SMATV has shown rapid growth, and already passes approximately 500,000 homes, 150,000 of which subscribe.

116. Although perhaps of less direct relevance in this context, other new forms of visual product delivery that compete with the older technologies are video tapes and video disk players. Video tape recorders not only allow prerecorded tape to be played but also permit the operator to record programs from the other media thus enabling the consumer to view programming at his leisure. Currently, there are an estimated 2.1 million homes with video recorders or about 2.6% of all households. Video disk players now are in 300,000 TV households, and this number continues to grow as new titles become available.

117. The networks, according to unchallenged data supplied by CBS, account for only 54% of the total video product purchases today, compared to 74% at the time the financial interest and syndication rules became effective. For example, 30% of HBO and Showtime's programs currently are produced either by them or by others for them. Daytime, a cable network showing women's programming, uses only original programming and about 55% of the children's programming carried by Nickelodeon, another cable network, is original with the network. HBO expects to spend $60 million on original programming in the next two years.[28] However, at present broadcast TV remains the principal purchaser of entertainment series.

118. Today, the syndication industry generates $800 million annually in revenues.[29] A staff analysis of November 1982 data from Arbitron's *Syndicated Program Analysis Report* indicates that there are currently 25 distributors of 117 off-network syndication series. According to our estimates, the top syndicator has about a 16.5% share of available off-network programming hours, the top 4 distributors have a 48.4% share of this market and the top 8 firms represent 73.8% of off-network programming hours.[30] Others present similar estimates.[31] The available data suggest that the off-

[28] New York *Times*, April 3, 1983, Section 2, p. 1.

[29] CPD, p. 127.

[30] For each syndicated series, the distributor's share was weighted by program length and the number of markets where it is aired.

[31] The number of distributors of off-network syndicated entertainment series has varied little over the last decade, with the number generally between 20 and 25. The data submitted by CPD (ICF, Vol. 3, pp. 168, 189, 239, 240) and CBS (CBS

network syndication market is relatively concentrated now, just as it was a decade ago.

119. It appears that the future of the video market likely will be shaped by the growth of the new distribution technologies, including some fledging services not discussed in any detail here such as direct to home broadcast satellites and low power television, and the increasing number of cable and pay options. At least 38 new cable networks have already been announced.[32] It is widely predicted that prime time audiences will continue some shift away from the networks. However, forecasts of the prime time shares the networks will attract in 1990 vary widely, from 59% to 75% as the following table shows.

Table 7
1990 Prime Time Network Audience Share Estimates[33]

Forecaster	*Share*
CBS/Broadcast Group	70
ABC	60-70
NBC	68-70
Doyle Dane Bernback	65
J. Walter Thompson	63
Ogilvy & Mather	59
N.W. Ayer	75
Leo Burnett	70

120. The extent to which viewing patterns will change is, to a large extent, dependent on the growth of these new media. While specific predictions for 1990 vary, as Table 8 indicates, cable penetration is expected to approach 60% of all TV households with 45% of all TV homes expected to subscribe to at least one pay cable service.

Reply, Vol. I, Exhibit D, Table D-2, p. 6) for 1981-82 and the Network Inquiry Special Staff's most recent estimates (Preliminary Report, Tables F-28 and F-30) for 1977-78 are as follows:

	CPD	*CBS*	*NISS*
No. of distributors	25	NA	22
No. of programs	NA	NA	87
Top Firm	24.2%	17.8%	32.1%
Top 4 Firms	57.4%	60.9%	75.3%
Top 8 Firms	72.2%	98.3%	88.4%
Top 20 Firms	96.7%	NA	99.8%

Viacom (Appendix B) lists 23 distributors of off-network series, also. However, Metromedia lists 57 syndicators (Exhibit 5) of these programs. For purposes of comparison, CPD data for 1970 show 23 distributors, the top firm with a 15.6% share, the top 4, with 45.4%, the top 8 with 69.5%, and the top 20 with 97.9%.

[32] *Cablevision*, April 25, 1980, p. 98.

[33] Source: *Broadcasting*, March 7, 1983; CBS, Vol. I, p. 115; NBC, p. 99.

Table 8
Cable Predictions for 1990[34]

	Basic Subs. (millions)	*Basic Penetration (%)*	*Pay Subs. (millions)*	*Pay Penetration (%)*
Doyle Dane Bernbach	57.3	60		
CBS	60.0	60	45	45
Paul Kagan	53.4	57	46.1 (1989)	
Donaldson, Lufkin and Jenrette	53.5	55	65	
Frost and Sullivan	40.0 (1991)		34 (1991)	
J. Walter Thompson		60		30 (1989)
Ogilvy & Mather				46
NBC		60		45

121. It is expected that this growth in cable service will result in basic cable revenues rising to as much as $6.5 billion and pay cable revenues increasing to $8 billion compared to expected network revenues of between $15 and $20 billion. The other pay services also are expected to grow, to the point where 77% of all TV homes will have some type of pay service. This growth is expected to come from currently available pay services, direct broadcast satellites (DBS), and low power TV stations (LPTV). In addition, the Commission has recently authorized the allocation of additional frequencies to the MDS service so that they may provide a multichannel MDS service. This multichannel capability makes it more like an over-the-air cable service and may enable MDS to be a stronger competitor in the video marketplace. While it is difficult to predict the future with certainty, the following "educated guesses" in table 9 present a broad sketch of the video distribution industry showing the growth of the various video alternatives including estimates for the state of the industry in 1990.

Table 9
Availability of Video Options[35]
(millions)

	1970	*1975*	*1983*	*1990 Est.*
Broadcast TV (TV HHs)	59	70	83	97
Cable TV (subscribers)	5	10	28	58
Pay Cable (subscribers)		0.5	23	45
STV (subscribers)			1.4	5
MDS (subscribers)			0.5	3.2
SMATV (subscribers)			0.15	0.5-0.8
LPTV (TV HHs)				10
DBS (subscribers)				11
Multichannel MDS (subscribers)				6-12

122. It is extremely difficult to make estimates for the production and syndication industries of 1990. It is clear that the many new

[34] Source: ICF, Vol. 1, pp. 20, 29; NBC, p. 27.
[35] Source: CBS, Vol. I, pp. 54–5, 79–91 and previously cited data.

outlets will require a vast supply of programming. Some of this programming, no doubt, will be similar to the general entertainment fare currently associated with network prime time television. Other programming may well respond to much more specialized needs.

Effects of the Rules on the Network-Producer Relationship

123. Based upon the foregoing description of the video industry, we now present an analysis of the effects of the financial interest and syndication rules. The analysis is performed on each component of the system of markets that together comprise the video industry. We examine the effect of the rules on: (1) the programming market involving program producers and the broadcast television networks, (2) the off-network programming market involving syndicators and television stations, (3) the competitive situation facing the broadcast television networks and (4) the possibility of new broadcast networks.

124. *Monopsony Power of the Networks.* Part of the original rationale for the financial interest and syndication rules was a concern that networks were able to use the power of their position as program purchasers to obtain rights from program producers at less than compensatory rates. Specifically, the stated concern was that the networks would not pay program producers enough for the programs, would insist on obtaining the syndication rights as a condition for airing the programs on the networks and would exert undue creative control over the final product. In order for these concerns to be realized, two conditions regarding network behavior must be met. First, the three networks must be able to act in concert, either tacitly (by parallel behavior) or collusively (by active conspiracy). Second, the three networks together must comprise the sole purchasers of the program producers' product. If either of these conditions is not met, it is not likely that the networks could exert power over program producers. This is so because, if adequate alternative program purchasers exist, any producer who may be dissatisfied with the treatment he receives by *a* single broadcast network has the option of offering his product to a different network or some other program purchaser. Competition among these program purchasers thus would ensure that the program supplier receives a competitive price (full market value) for his product.

125. After considering all the available evidence, we have concluded that the extent to which the conditions hypothesized above accurately characterize today's media marketplace is very much in doubt. First, there is evidence that the three networks do in fact compete with each other. The networks are rivals in a ratings war.[36] Ratings have been volatile in recent years, with changes

[36] CBS comments, p. 37.

occurring in the networks' relative positions.[37] Second, there has been an expansion in the number of television outlets and network services that has caused an increase in the number of program purchasers and an increased demand for new programming. As a result, the network share in total program expenditures has declined over the years until it has now fallen to 54% of all expenditures on programming. The total share of the audience garnered by the networks is declining, which is further evidence that other viewing outlets are effective competitors to the networks as suppliers of entertainment programming.[38] To say that networks control the programs they buy is clearly true, but alternative program purchasers are developing to which program suppliers can turn should the networks try to lower the price they offer to program suppliers.[39]

126. Empirical research indicates that program producers, and their talent inputs, are able to renegotiate their contracts and consequently receive a higher income when their television series become more popular, i.e., achieve higher ratings.[40] Thus, through the contract renegotiation process, program suppliers are able to share, with the networks, in the higher revenues that are earned as a show gains in popularity. If networks exercised collective monopsony power against their program suppliers, we would not expect them to be forced to share this added revenue with their program producers. In fact, if the networks had such collective monopsony power we might expect that they would attempt to lower the price they offer for successful programs during the network run since the amount a program would earn during its syndication run likely would be higher. Even though its network earnings would be less, a producer would be no worse off because it could recoup these revenues when the program goes into syndication. The network would have the ability to retain all the extra revenues which are earned due to a show's popularity because a producer would have no other program purchaser to whom it could sell the program, *i.e.*, the producer has no bargaining power. The networks' apparent inability to retain all the additional revenues earned by a successful television program during its network exhibition indicates that they are not exercising collective monopsony power against the program producers.

127. The available evidence also leads us to the conclusion that collusion among the networks would be difficult to achieve and maintain. Overt collusion would be hard to conceal and would be

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[37] CBS comments, Exhibit B.

[38] See CBS, pp. 98–99, 115; and NBC, pp. 97, 101, 103.

[39] See CBS, p. 101; and NBC, pp. 104–107.

[40] See Noll, Peck and McGowan, *Economic Aspects of Television Regulation* pp. 44–47 (1973); Owen, Beebe and Manning, *Television Economics*, pp. 38–40 (1974); Woodbury, Besen and Fournier, "The Determinants of Television Program Prices: Implicit Contracts, Regulation, and Bargaining Power," (mimeo, January 1983).

prosecutable under the Sherman Act. With respect to tacit collusion or parallel conduct, as the Department of Justice points out, the antitrust laws might not be as effective a tool. There are reasons to believe, however, that such conduct in terms of the type of conduct here in issue would be difficult for the parties themselves. Restrictions on price competition would likely require overt conduct. However, when nonprice features of goods or services such as product quality or contract terms, are not uniform and are important determinants of the value of a product coordination problems become severe. This is clearly the case with program purchases by the networks. The Network Inquiry Final Report describes, in exhaustive detail, the complicated and delicate contracting process between networks and program producers, beginning with idea development and ending when the program goes off the air. Maintaining parallel or collusive behavior in such a complex environment would require unreasonably complicated efforts.

128. The presentations by parties alleging network market power do not persuade us that such power is sufficient to result in the deleterious effects that have been alleged. For example, evidence is presented regarding the movement of personnel from one network to another.[41] It is not clear that this movement of personnel, which purports to be evidence of network parallel behavior, occurs at higher incidence than in other industries. Moreover, such movement would make collusive activity impossible to conceal.

129. Parties also claim that failure of the networks' license fees to cover all production costs is evidence of network market power. However, it is not evident that what they term "deficit financing" is a reflection of network monopsony power. Obviously, the costs of production must in the long run be covered by revenues from all the potential uses of the program, including foreign and domestic syndication. If producer's costs were not at least met, the industry would soon be bankrupt and all producers would leave the industry. From an economic standpoint, all costs need not be covered by network payments alone simply because all costs of production are incurred before network broadcast. In fact, if the rules have any effect, they might make "deficit financing" more likely. This is so because the rules prevent the networks from purchasing the complete set of rights to a program. Consequently, producers who want to cover their production costs immediately may have difficulty in obtaining other sources of financing to replace the full financing supplied by the networks prior to the rules.

130. Finally, there is empirical evidence that networks obtained syndication rights on a fully competitive basis prior to the rules. One study, performed by Robert Crandall, concluded that payments for

[41] See ICF, p. 1-22.

these rights were made in the form of higher license fees, and that the payments approximated the full market value of the rights.[42] Furthermore, our analysis indicates that networks did not obtain a "monopoly" share of syndication rights when they purchased them before the rules. In fact, the networks together obtained less than a 25 percent market share.[43]

131. *Effectiveness of the Rules.* Focusing narrowly on the concerns scrutinized in this section of the analysis, we must conclude that the rules are unnecessary if the networks have no demonstrable monopsony power. Thus, it is expected that the financial arrangements arising from the normal business relationship between the networks and program producers will equitably reflect the competitive process. Of additional concern, however, is whether, even if the networks did have a significant degree of market power, the rules effectively would preclude the networks from exercising it. Our analysis leads us to believe that the financial interest and syndication rules are unlikely to curb any network market power that could exist. The fundamental reason leading us to this conclusion is that the rules do not modify the source of any such market power, *viz.*, the structure of the market. The market structure is defined by the fact that there are only three broadcast networks. Any market power that could derive from this structure could be exerted in ways other than bargaining for syndication rights. With regard to producers in particular, other aspects of their contracts with the network (such as the license fee paid to program suppliers) could reflect their inferior bargaining positions. The rules do not change the networks' control over the nature of the programs they choose to purchase for broadcast. Even with the rules in place, each network selects which program it will air and which it will not and thus holds veto power over any content it does not wish to air. Accordingly, producers' fear of losing creative control of their programs if the networks regain a financial interest appears unfounded.

132. Further, it does not seem in the best interest of the networks to behave in a manner that induces producers to exit. If there were fewer producers, they could more effectively act collectively and exercise market power with respect to their dealings with the networks. Under such an outcome, networks would be made worse off. The networks benefit from the presence of many independent producers contending for their patronage.

133. *Cost of the Rules: Inefficient Risk Sharing.* The financial interest rules prevent networks from obtaining a financial interest in programs produced by others. Therefore, the rules force suppliers who wish to permit others to have a financial interest in their

[42] Crandall, "FCC Regulation, Monopsony, and Network Television Program Costs," 3 *Bell J. Economics*, p. 483 (1972).

[43] *Report and Order in Docket No. 12782*, 23 FCC 2d 393 (1970).

programs to choose between: (1) selling in a market with an artificially reduced number of prospective purchasers, since three major purchasers in a position to offer favorable terms have been excluded by the rules, or (2) retaining the rights or interests they would prefer to sell, thus bearing by themselves risks they would prefer to share or shift to others. The result of this artificial altering of the program market may be to reduce efficiency, competition and diversity in the supply of network programming.

134. Financing production of a good by the sale of future interests in one or more stages of distribution is a common and accepted method to distribute risk efficiently.[44] Although other members of the program production market, to some extent, are capable of bearing and hedging risk, the networks may be in a unique situation with respect to shouldering these risks. As analysts have found, (1) networks bring together an efficient nationwide group of station outlets, (2) networks have continuous information from both advertisers and station affiliates concerning changing public tastes, (3) networks are able to pool the risks of individual programs across an entire program schedule, and (4) networks have expertise in designing overall program schedules with maximum attractiveness in the face of competing schedules.[45] Further, networks may be able to promote programs more efficiently if they can coordinate network and off-network runs. This promotional aspect is important, however, only if the behavior on the part of the networks that enhances the value of a program's network run is different from that which would enhance the value of the program during its off-network run. In other words, if a network would not promote a program any more heavily if it would benefit from the syndication run than it would otherwise, then the rule does not prevent promotional efficiencies. Even so, the rule may lead to shorter-than-optimal runs for network programs.

135. To the extent the rules prevent an efficient sharing of program risks, there is less investment in network programming than there would be in the absence of the rules and the quantity, quality, and diversity of programming is artificially limited. Also, inefficient risk-sharing could lead to higher program production costs. In turn, the cost of network time to advertisers and the cost of advertised products to consumers likely are greater than they otherwise would have been. The programs most likely affected by such risk inefficiencies are those that present the most risk. Thus, the diversity of programming actually produced may have been

[44] Network Inquiry, Staff Report, Vol. II, p. 406.

[45] Network Inquiry Staff Report, pp. 746–54; CBS Vol. I pp. 127–130; Franklin Fisher, CBS Vol. II, Appendix E, pp. 17–22; Alfred Kahn, p. 17; Shooshan and Jackson, pp. 5–11; FTC, pp. 31–34.

reduced because the rules have encouraged production using tried and true formulas.

136. Further, while the rules do not increase the aggregate profitability of all program producers, they may shift revenues among individual producers. Any producer less willing to bear risk than the networks might prefer to sell the rights to the network initially, but the rules bar such a producer from doing so. By making it more difficult for risk-averse producers to survive, the rules may aid those producers who are more willing and able to bear risk. Thus, if larger, established producers are better able, and hence more willing, to bear risk than smaller or new producers, the current rules work to the advantage of the larger producers who are relatively better off and insulated, to some degree, from competition and new entry. The end result may be a more concentrated and less diverse program supply industry.

137. The limitation on network-producer risk-sharing will cause significant inefficiencies only if producers are substantially less able than the networks to bear risks involved in program production. Indeed, there is some evidence that producers are currently interested in assuming some of the risk that the networks now bear.[46] This would indicate, at the least, that producers are not currently overburdened with risk. The Network Inquiry Report points out that where the probability of financial loss is assumed to be 50 percent on a single program, it falls to approximately three percent if five statistically independent programs are pooled.[47] If that level of pooling is not attained by some independent producers alone, it perhaps can be achieved through joint ventures. Further, large production companies, banks and other large corporations may have risk-spreading advantages the broadcast networks may not possess.[48] In addition to spreading investment risk across many programs, these non-broadcast entities can spread their investment risk across *networks*. Such an advantage may or may not be significant in quantitative terms. Their lack of expertise in the programming field may deter nonbroadcast entities from such investments since they may be unwilling to take large risks on projects they are unable to assess well. On the other hand, they can pool their entertainment investment risk with investments in other areas.

138. As discussed above, from a theoretical point of view the major effect of the rules as they relate to the program production industry appears to be to force inefficient risk-sharing arrangements that could cause a variety of ill effects on program producers and on

[46] Comments of ICF, p. I-16. ICF contends that networks have consistently rejected producer proposals with incentive clauses for successful program performance and greater producer risk on the downside.

[47] Network Inquiry Staff Report, Vol. II, p. 617.

[48] DOJ reply comments, pp. 4–5.

the programs produced. Although intended to lessen concentration in the program supply industry and thereby increase diversity in the sources of programming exhibited on the networks, a close review of the economic effects of the rules makes it appear, at least at the theoretical level, that they could actually have the opposite effect. Considerable effort has therefore been expended in this proceeding in attempting to find empirical evidence to confirm or dispute this conclusion. Having reviewed the evidence relating to concentration in the supply market both before and after the rules, we find no evidence that the rules have served to decrease concentration in the supply market or increase the diversity of program sources. Instead, it appears that the supply market was not particularly concentrated at the time the rules were adopted and that this market was and is today a competitive one. While various definitional and statistical problems and the influence of factors beyond these rules make conclusive judgments difficult, there is some evidence to support the proposition that the rules create incentives that lead toward concentration rather than away from it.

139. There seems to be no disagreement that, in the years immediately following the adoption of these rules, the number of producers supplying programming for prime time network exhibition declined rather dramatically. Using the measurement statistics preferred by the Committee for Prudent Deregulation, the number of producers declined from 61 in the 1969–1970 television season to as low as 30 in the 1974–1975 season.[49] Averaging the data supplied from before and after the rules, again using the CPD preferred data, shows an average of 66 producers per year in the pre-rule, 1964–1971, period and an average of 47 producers per year in the post-rule, 1972–1982, period—a decrease of 29 percent. The Network Inquiry Special Staff in its study of this issue, after comparing 1969–1970 and 1977–1978 data, also found some measure of increased concentration but noted that most of the increase was due to the rise in the share of the leading firm which had doubled the number of series programs it was supplying.[50]

140. CPD argues, to the contrary, that, comparing 1969–1970 and 1981–1982 data, the number of suppliers has increased from 61 to 67. It should be noted, however, that 1981–1982 is the only season of the thirteen that have passed since the rules were adopted where this comparison would show an increase. Data contained in the appendix to the CPD comments, but not cited in the body, show that the most recent data (1982–1983) demonstrate a continued decline. Thus, even using the data most preferred by the proponents of continued regulation, there is no evidence that the rules have

[49] ICF Vol. 2, appendix 3, p. 109.

[50] Network Inquiry Staff Report, Vol. II, p. 556. In subsequent years, the share of the leading firm declined, causing measured concentration to decrease.

decreased concentration and, indeed, there is some evidence that they may have increased it.

141. Other data supplied by other parties, evidence larger and more consistent declines in the number of producers. CBS data, for example, showed a substantial increase in concentration, with the number of prime time producers dropping to 41 in 1981–1982 from 61 in 1969–1970.[51] The reason for the difference between the CBS and CPD data is that each used a different definition of producer. CBS simply counted the number of entities who had contracted with a network for the production or delivery of a program.[52] CPD counted all those who had management and/or creative responsibility or a financial interest in the proceeds from the first-run exhibition.

142. In an effort to facilitate a comparison of the data from the two sources, the Commissison's staff prepared its own estimates. The staff established set fall schedules for both the 1969–70 and 1981–82 seasons. The data submitted by CBS and CPD were then used to arrive at producer and program counts for each methodology.[53] From these data, various estimates of production industry concentration were derived. The results are presented in the tables below.

Table 10
Summary of the Production Industry

	1969-70		*1981-82*	
No. of Programs	75		69	
No. of Hours	59		54	
	CPD Method	*CBS Method*	*CPD Method*	*CBS Method*
No. of Producers	61	48	65	31
Market Shares				
Top Firm	12.7%	14.4%	7.4%	9.3%

[51] CBS comments, Vol. 1, p. 149, appendix J.

[52] CBS comments Vol. 1, p. 147, footnote 279 and data submitted April 25, 1983.

[53] More specifically, the staff methodology first defined a base fall season schedule for each year. (For 1969 the source was the *Complete Directory to Prime Time Network TV Shows 1946 - Present*, Tim Brooks and Earle March, Ballantine Books, New York, 1979. The 1981 fall schedule was derived from information in *Broadcasting*, May 4, 1981, pp. 30–1, August 17, 1981, pp. 134–5, August 24, 1981, p. 48, September 14, 1981, pp. 32–3, and November 23, 1981, p. 60.) For each program on this schedule, the producer or producers were identified from the raw data submitted by CBS and CPD. Then, for each producer and program a weight was calculated. This weight was the program length (hour, half hour, etc.) multiplied by the producer's share. For a sole producer this share was one. Where joint ventures existed, the share was equally divided among all production companies. (CPD weighted its data in this manner. CBS used the number of episodes, including reruns, as an additional factor.) Next, a total of these weights was calculated for each producer. Finally, this total was divided by the total number of prime time hours, which was equivalent to the sum of all producers' weights. The result was an estimate of each producer's market share.

Top 4	30.1%	33.9%	22.3%	31.6%
Top 8	42.4%	49.2%	37.9%	55.8%
Top 20	62.8%	70.4%	63.5%	87.7%
HHI[54]	381	476	283	525
Joint Ventures				
No. of Programs	17	7	33	1
% of programs	22.7	9.3	47.8	1.4
No. of hours	12.5	4	26	0.5
% hours	21.2	8.5	48.1	0.9
Studios[55]				
No. of programs	33	34	32	33
% of programs	44.0	45.3	46.4	47.8
No. of hours	26.5	27	23.5	24.50
% hours	44.9	45.8	43.5	45.4

143. Comparisons of these data show relatively small changes in the level of concentration in the production industry both in terms of concentration ratios and in the Herfindahl-Hirschman Index, the measure preferred by the Department of Justice. Using any of the measures, the production industry was relatively unconcentrated in 1969 and remains so today. These studies would appear to reveal that, in the production industry, the rules may have had some negative effect.

144. If it is correct that the rules function to prohibit the networks from operating as efficient risk bearers for more risk averse producers in the production of programming, then it could be expected that, after the rules went into effect, smaller producers would be increasingly forced into joint ventures with others. The chart below, prepared using the staff methodology and CPD producer definitions, does suggest some increase in the percent of programs that are produced by the major studios in combination with independents and by independents in conjunction with other independents, as theorized.

Table 11
Joint Ventures

Producer Network	*1969* (Percent Program)	*1981* (Percent Program)	*1969* (Percent Hours)	*1981* (Percent Hours)
alone	4.0	5.8	5.1	7.4
w/independent	1.3	1.4	1.7	1.9
Total	5.3	7.2	6.8	9.3

[54] The Herfindahl-Hirschman Index (HHI) is a standardized measure of concentration calculated by summing the squares of each firm's market share.

[55] The major studios producing prime time network programming during the periods in question were: Universal; MGM; Warner Brothers; Walt Disney; Embassy Communications (Avco/Embassy); 20th Century Fox; Paramount; Columbia (Screen Gems); and Orion (Filmways) (Source: ICF, Vol. 2, p. 110–124).

Producer	*1969* (Percent Program)	*1981*	*1969* (Percent Hours)	*1981*
Studio				
alone	29.3	13.0	31.4	11.1
w/independent	14.7	33.3	13.6	32.4
Total	44.0	46.4	44.9	43.5
Independent				
alone	44.0	33.0	42.4	33.3
w/independent	6.7	13.0	5.9	13.9
Total	50.7	46.4	48.3	47.2

Effects of the Rules in the Syndication Market

145. The second market where the effects of the rules are analyzed is the syndication market in which off-network programming is sold to local television stations. The concern has been expressed in the comments that repeal of the rules would allow the networks to exercise control over the availability of off-network programming, and that television stations, particularly independent stations in competition with network affiliates, would be affected adversely by such control. Indeed, this concern underlies much of the opposition to repeal of the rules. Commenters most commonly express a fear that some off-network programs might be "warehoused," *i.e.*, withheld from the market. Their argument is, in essence, that such warehousing of off-network programs would either drive up the price of programming or would reduce the size of independents' audiences.[56] Other commenters claim that repeal of the rules would have beneficial effects on television stations because it would permit the achievement of efficiencies in the production and distribution of programming.[57] Each allegation is discussed in some detail below.

146. *Withholding of Off-Network Programs.* The most comprehensive exposition of the argument that networks would have the ability and the incentive to withhold programming in an anticompetitive manner in the absence of the rules is contained in a study by ICF Incorporated, conducted under contract and submitted by CPD.[58] Since the ICF study was a central focus of many reply commenters, it is discussed here in considerable detail. A key assumption made by ICF in its report is that a small number of firms

[56] Commenters expressing this view include the Committee for Prudent Deregulation (CPD), Independent Television Stations, Inc. (INTV), Metromedia, Inc., and others.

[57] These commenters include Franklin M. Fisher and William J. Baumol, in reports submitted as appendices to the comments of CBS, Inc., and the National Broadcasting Companies, Inc.

[58] ICF Incorporated, "Analysis of the Impact of Repeal of the Financial Interest and Syndication Rule," Report to the Committee for Prudent Deregulation, January 26, 1983.

would have as much power over program supply as would a single supplier. ICF asserts that, in some circumstances, those few firms would restrict the supply of programs by withholding some from the market in order to increase the price of the programming that remained on the market. Although their discussion is somewhat abstract, it is essential that a brief account of it be made here. ICF's theory runs as follows. Stations choose the programs they wish to air on the basis of the net revenues each will generate. When programs of differing quality, as indicated by the potential advertising revenues they would generate, are offered to stations, the prices of the programs chosen are held down by the prices of alternatives not selected, since stations could choose those alternatives instead of the programs actually selected. Removing the best unselected program from the market will leave a poorer unselected program as the best alternative.[59] Elimination of the best alternative program would increase the gap between the advertising revenues generated by the programs selected and the best alternative not selected. Prices of programs that are selected would then be free to rise above their original levels.[60] ICF asserts that such withholding could be accomplished by a single syndicator acting independently, and would not require collusion among syndicators.

147. ICF presents four theoretical cases in which a syndicator of television programs would elect to withhold programs from the market. In the first case, the programs withheld would not have been shown in any case, so that withholding them would not affect the programming shown. Such withholding would leave the programs

[59] Some commenters (INTV and TBS) have asserted that the networks would have an incentive to withhold their most popular programs from syndication in order to deny them to independent stations and thus damage the independents' competitive position. Since the most popular programs earn the highest syndication revenues, withholding them would entail higher costs to the networks than withholding other programs. As in the case of other shown programs, for withholding to be profitable, the advertising revenues gained would have to outweigh the loss of syndication revenues. Consequently most commenters rule out withholding of the best programming; even ICF states that such withholding would be less likely than withholding of less popular programming. See "Response to comments on the ICF Report," ICF Incorporated, Apr. 26, 1983, p. 14.

[60] A hypothetical example may help clarify this theory. Suppose that programs A, B, and C are available for a single time slot and would generate advertising revenues of $1,000, $800, and $600, respectively. Assume also that the cost of distributing a program (the minimum price at which any program would be sold) is $100. If program B were to sell for $100, then the maximum that could be charged for program A is $300, since A would only earn $200 more revenue than B. If the owner of program A attempted to sell it for more than $300, B would earn higher net revenues for the purchasing station. But suppose A and B are owned by the same seller. Then that seller can withhold B from the market, and if C sells for $100, A can be sold for up to $500 and still earn more revenue for the station than C. The seller has increased the price of A by $200 and lost nothing, since B would not have been sold in any case.

available to viewers unchanged and so would not affect viewer welfare. Withholding of this sort also would impose no additional cost on the syndicator who withheld the programs, since he would not forego any revenues by withholding unshown programs. The sole direct effect would be an increase in program prices and a consequent transfer of revenues from the stations to the syndicators of the programs that are shown.

148. In addition, some supporters of the rules assert that, since stations' programming costs would rise with increasing program prices, there would be a reduction in independent stations' profits, which in turn would reduce those stations' ability to acquire high-quality first-run syndicated series or theatrical features.[61] Thus, they believe, the quality of programming on independent stations would deteriorate. Their argument does not appear to be valid, however, because one would expect program acquisition decisions to be made on the basis of the expected net revenues of the programs to be acquired, and that a loss of profits as a source of funds to purchase programs would be unlikely to affect those decisions. The same supporters of the rules state that a decrease in the profits of independent stations would retard the entry of new stations and, consequently, would decrease the likelihood of formation of a fourth network.

149. The second theoretical case that ICF discusses would result in the same effects as the first except that, in addition, the programming actually shown would change as a result of warehousing. In this second case, ICF posits some small fringe suppliers in addition to the dominant firm. If the dominant supplier owned several programs, but not the best unselected program, it could have an incentive to withhold one of its own programs that otherwise would have been selected. This would mean that the best previously unselected program would be purchased instead of the program withheld, leaving a still poorer program as the best unselected show. Such withholding would cause the prices of selected programs to rise.[62] If the dominant supplier also owned the program that became the best unselected program, it could have an incentive to withhold

[61] Commenters expressing this opinion include TBS and INTV.

[62] Another numerical example may be useful. Suppose this time there are two time slots to be filled and programs A, B, C, and D, providing advertising revenues of $1,000, $900, $800, and $500, respectively, are available. Distribution cost is again $100. Programs A and B will be sold for at most $300 and $200, since the next best alternative is program C, which costs $100 and provides $100 less revenue than B and $200 less than A. If the owner of A does not own C, he cannot withhold it to raise the price of A and B. But if he owns B, he can withhold B so that C will be purchased instead. Then D will become the best alternative program. The price of A can rise to $600, since the best alternative costs $100 and provides $500 less revenue than A. The owner of A now earns more from selling A alone than he did from selling both A and B.

that program as well, thereby allowing the prices of selected programs to increase still further. In addition to the effects on prices, this strategy would cause stations' audiences and advertising revenues to fall, since programs would be withheld that would have attracted larger audiences than those actually shown. As a result viewers' welfare would decrease, since preferred alternatives would be unavailable to them. The syndicator who withheld the program (who also would be the dominant firm) would lose the revenues from the programs that were withheld, but all syndicators of shown programs would gain revenues from the increased prices of the programs that were shown.

150. These two strategies could be pursued by any syndicator who owned rights to the necessary programming. The third and fourth cases presented by ICF involve additional effects that ICF asserts the networks could accomplish because they are integrated into broadcasting and because they sell television advertising in competition with the independent stations. In the third case, the networks would raise advertising prices to a higher level than they would if they were not integrated into broadcasting. Raising their advertising rates would cause the networks to lose some advertisers to the independent stations, but as a consequence of the new demand for their time the independents' advertising revenues would increase and they would be able to pay more for programming. Then, according to ICF, the networks would be able to raise prices of off-network programs even higher than in the first two scenarios and could more than recover their initial losses of advertising revenues to the independents. Although independents may not be any worse off under this scenario—they would have higher costs but also higher revenues—consumers and advertisers would be adversely affected because advertising rates and prices of advertised products would rise.

151. In the fourth scenario, ICF asserts that the networks' involvement in broadcasting would give them an incentive to carry the withholding strategy further than if they merely distributed programming. Networks could reduce the quality of programming shown by independents either by making high-quality off-network programming unavailable or by raising the price of high-quality programs to the point where the expected advertising revenues from the programs would not cover their cost. This is the case about which most commenters expressed concern, and the one which yields the most detrimental alleged effects. If withholding of programming by the networks caused independent stations to show inferior programming the independents' audiences and advertising revenues would fall. Some of the viewers lost to independent stations would switch to the affiliates or owned stations of the network withholding programming, thereby potentially increasing that network's advertising revenues. In addition, if the increase in program prices or the

reduction in audiences caused independent stations to reduce their hours of operation or to cease operation, and if there were no good substitutes for television advertising, then the decrease in the quantity of advertising time available would cause an increase in its price. Thus, the networks and affiliates would gain not only from increased numbers of viewers but also from increased advertising revenues per viewer. In addition, ICF concludes that viewers would have less desirable programs from which to choose and a smaller number of choices. Finally, that part of the increase in advertising prices would be passed on to consumers in the form of increased prices for advertised products.

152. *Likelihood of Withholding Programs.* The ICF theories presented above appear consistent with economic theory. Whether or not they accurately depict reality, however, depends, on several assumptions about the characteristics of the syndication market. At the heart of the theories are the requirements that the networks both be able to affect the price of off-network syndicated programming by controlling its supply, and have an incentive to do so. We examine below the assumptions underlying the warehousing theory and the likelihood that they could all be met. While we conclude that withholding is unlikely, we find that it is impossible to rule it out entirely.

153. The first assumption is that off-network programs must constitute a separate, at least somewhat distinct, market. For control of the supply of off-network programming to enable the dominant supplier to affect its price, no good substitutes must be available near that programming's prevailing price. Otherwise, increasing the price of off-network programming would merely encourage independent stations to purchase one of the substitutes. In fact, many other forms of programming are available to independent stations, including first-run syndicated programs, sports shows, theatrical films, and locally-produced programs. Nevertheless, the half-hour segments of recent off-network shows may be somewhat better suited to this time slot.

154. ICF and others opposing repeal of the rules assert that, for important time periods, other forms of programming cannot generate net revenues as high as those of off-network programs.[63] Thus, the existence of such programming cannot constrain the prices of off-network programs. Off-network programs, they assert, cost less for similar program quality and audience ratings because their production costs have already been recouped during the network run. These parties believe that off-network programs are less risky than the alternatives because their ratings can be more readily predicted by

[63] See ICF, "Paper 2: The Economic Effects of the Repeal of the Rule on Advertisers and Independent Stations," pp. 3-12—3-34, and comments of the Department of Justice.

using their ratings during the network run as a guide. In addition, they argue, for the 4:00 to 8:00 p.m. time period (a period during which independents earn a considerable portion of their revenues), longer programs such as movies and sports events are unsuitable because most viewers are unwilling to commit large blocks of time to watching television. To the extent this is true, there may be a distinct submarket.

155. The study submitted by Crandall, Noll, and Owen presents evidence that many first-run syndicated programs are shown between 4:30 and 7:30 p.m., and further, that many of those shows receive ratings as high as or higher than the highest-rated off-network programs.[64] Thus it appears that first-run syndicated programming can generate revenues similar to those of off-network programs, so that from the point of view of television stations they can be considered close substitutes for off-network shows. The study also shows that while only a few of the programs shown in the 4:30 to 7:30 p.m. period have high ratings, a large number of programs receiving more or less similar lower ratings, both off-network and first-run, are shown in that period.[65] Even if many of the best unshown programs were withheld, many more with the same potential revenues would be available. Without controlling nearly every unshown program in syndication, including first-run pro-

[64] Robert W. Crandall, Roger G. Noll, and Bruce M. Owen, "Economic Effects of the Financial Interest and Syndication Rule: Comments on the ICF Report," Owen, Greenhalgh, & Myslinski Economists Inc., April 1983, pp. 84–5. Because the 7:30–8:00 p.m. period is omitted, the programs and ratings reported are not directly affected by the prime time access rule.

[65] *Id.*, pp. 83–86. ICF, in fact, defines the market more narrowly as recent off-network programs shown between 4:00 and 8:00 p.m. and between 11:00 p.m. and 1:00 a.m. Others, however, present evidence that programs shown in other time periods substitute readily for these programs. An FCC staff study reports that all but one of the 101 most popular syndicated programs are shown in more than one daypart. In fact, 42 percent of them appear in five or six dayparts. An implication of this fact is that while movies, sports, and the like may not be usable in the 4:00–8:00 p.m. period, they can be substituted for series shown in other dayparts that could be shifted to that period. *See* Jonathan D. Levy, "Is There a Separate Market for Off-Network Programming and How Easy Would It Be to Collude Therein?", p. 4. In a study submitted with CBS's reply comments, Joskow shows that a typical station shifts many programs between 4:00–8:00 p.m. and other dayparts. The station's audience shares, with few exceptions, appear fairly constant across dayparts. Paul L. Joskow, "Comments on the Effects of Repeal of the Financial Interest and Syndication Rule," in Reply Comments of CBS, Inc., Appendix B. Vol. 2, Table 20; ICF Exhibit 1–23. Joskow also notes that older off-network programs are good substitutes for recent ones. In a survey of ten top-rated independent stations, off-network programs in syndication more than five years accounted for about one-third of programming time between 4:00 and 8:00 p.m.; the stations broadcast an average of two programs more than ten years old during this period. *Id.*, Tables 16, 17. Joskow estimates that in a market with three affiliates and two independents, about sixty half-hour series a year—far too many to be supplied from popular, recent off-network fare—would be required to fill the 4:00–8:00 p.m. time period. *Id.*, p. 30.

grams, it would be impossible to create a gap in potential revenues between the last program shown and the best unused alternative. However, to the extent that such a gap may exist, successful warehousing, following the strategy referenced by ICF, Inc., might be practical. In this regard, it is appropriate to give some credence to the business judgment of industry practitioners. A statement by 58 managers of independent stations asserts that there are few good substitutes for off-network programs in the 4:00–8:00 p.m. period, and the revealed preference of at least one major group owner of independent stations is overwhelmingly for off-network programs in the early fringe period. Furthermore ICF, in its reply comments, cast some doubt on the homogeneity of the marginal programs asserted by Crandall, Noll, and Owen.[66]

156. A second assumption underlying ICF's warehousing theory is that the networks have the ability to acquire all syndication and financial rights to most or all off-network programs. If suppliers other than the networks controlled programs that would provide good substitutes for those over which the networks gained control, then a withholding strategy could not be effective. The ICF report asserts that the networks would have the power to extract syndication rights from program producers. CPD suggests that the broadcast networks would be able to acquire all syndication rights because there are no alternative buyers for the producers' programs, and because network program contracts are negotiated at an early stage when the producers are particularly vulnerable.[67] The fact that syndication rights are acquired early in a program's life, before the program's success is known, means that the networks would have to acquire syndication rights to most of their programs, whether they eventually went into syndication or not. While evidence concerning networks' market power in the purchase of programming appears mixed, as discussed earlier, there appears to be considerable evidence that contracts between networks and program producers

[66] Comments on CPD, attachment 3, comments of Metromedia, Inc. at 35 and ICF, Inc. response to comment of the ICF Report at 12–13. It is noted that while Crandall, Noll, and Owen suggest that the supply of syndicated programming is elastic and hence that witholding is impossible, their own discussion shows an inelastic curve.

[67] Cable networks have begun to buy program series, so that the networks may in fact no longer be the sole purchasers for the producers' output. At the time comments were filed in this proceeding, some parties, including the Department of Justice, questioned the significance of these alternative buyers. Indeed, ICF, Inc. stated that "not one high quality series has ever been sold to pay cable." Now many examples of such programming could be cited. For instance, Home Box Office (HBO) now has two series in production, and HBO executives expect that original series will eventually make up about one-third of its original programming schedule. *Multichannel News*, February 14, 1983. Cinemax has recently bought the program "SCTV," dropped by NBC. New York *Times*, May 18, 1983. The Disney Channel plans to show 13 original series, making up 50 percent of its daily lineup. *Variety*, April 20, 1983.

tend to be informal and flexible, allowing renegotiation if a program becomes successful.[68] Thus members of the production industry appear to retain large shares of the profits of successful shows.[69] If so, it appears likely that producers would be able to retain a financial interest in syndication rights if those rights proved valuable.

157. If the networks merely bought syndication rights in a competitive market, then they would have to pay the full market value for those rights. If the prices paid reflected the full value of the programs, warehousing would be pointless, since such prices would incorporate all the revenues the programs would be expected to generate in syndication. Consequently, all the gains from withholding programs would be lost. Even if the syndication rights were worth more to the networks than to other potential purchasers, so that the networks could outbid everyone else, price competition among the networks could result in the full market value of the rights being paid. If, however, there is collusion, either overt or tacit, among the networks in the purchase of programs, prices might not rise to their full competitive market value.

158. As a practical matter, if the rules were repealed, the networks initially would hold no syndication rights, because they have been prevented from acquiring them up to this time. If they began acquiring such rights immediately, the programs whose rights they bought would still not enter syndication for several years.[70] For some years thereafter an inventory of economically-useful older off-network programs whose syndication rights belong to non-network companies would remain to compete with the networks' programs. In the meantime, series produced for cable or other new media would reach syndication and provide additional competition. Therefore, even if it were true that the narrowly-defined off-network program market was the relevant one and even if the networks could acquire control of recent off-network programs, they would continue to face

[68] *See* Network Inquiry Staff Report, pp. 480–495, 515–526. See also Joskow, pp. 17–19.

[69] Stars of hit television series have been able to acquire from the networks commitments worth several million dollars to use the stars' companies for production of future series. The magnitude of the agreements suggests that in fact the production industry possesses considerable power vis-a-vis the networks. Los Angeles *Times*, January 23, 1983.

[70] As discussed earlier, about 80–100 episodes, which would require a network run of four or five years, are considered necessary for successful syndication. FCC Network Inquiry Special Staff, pp. 410–411. In a study for NBC, Booz, Allen, and Hamilton, Inc. estimate that if the networks acquired distribution rights to 50 percent of their prime time entertainment series—almost twice the percentage acquired before adoption of the rule—by the year 1993 they would jointly control less than 25 percent and by the year 2000 less than 40 percent of off-network programs shown in early and late fringe on independent stations in the top 20 markets. Reply comments of NBC, pp. 78–79.

competition from other sources. Although, as has been noted, some types of anticompetitive conduct are difficult to police, if the networks did acquire syndication rights to most off-network programs, that fact would be readily observable to the Commission, the Department of Justice, and the Federal Trade Commission.

159. A third assumption underlying the warehousing theory is that the networks must be able to collude in the sale of programs. The ICF Report asserts that a syndicator who owned even a small number of off-network programs might be able to withhold some of them and raise the price of all off-network programs that were shown.

160. As discussed above, withholding a program that would have been shown, or the best unshown program, causes a new program to become the best unshown program. If the revenue potential of the new best unshown program is substantially lower than that of the original one, then withholding can raise program prices significantly. ICF presents a hypothetical example in which program prices are driven up by a series of program withdrawals by three suppliers. However, as pointed out by Crandall, Noll, and Owen, once these programs have been withheld, the higher program prices create an incentive for individual syndicators to increase their profits by re-offering withheld programs at relatively low prices.[71] If they do so, program prices will fall to their original levels, and warehousing will fail. ICF's model prohibits such behavior, but provides no explanation of why it would not occur. In fact, collusion among program syndicators appears necessary to prevent re-offering of withheld programs.

161. This analysis leads us to believe that warehousing would require collusive behavior among syndicators in the sale as well as in the purchase of programs. It is widely believed that most collusive agreements tend to be unstable because the parties to the agreements face powerful incentives to violate them.[72] If a collusive agreement raised prices above competitive levels, a firm could secretly lower its prices or sell products instead of withholding them, and thus could expand its share of the market, and its profits, at the expense of the other parties to the agreement. Long-term maintenance of a collusive agreement requires certain conditions. Among other things, because of the incentives to violate such agreements, the colluders must be able to police each other's activities on a rather

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[71] Crandall, Noll, and Owen, pp. 59–64. First-run programs would also become relatively more attractive, and producers would have an incentive to expand the supplly of such programs.

[72] For a thorough presentation of current economic thought concerning the conditions facilitating and limiting oligopolistic coordination, see F.M. Scherer, *Industrial Market Structure and Economic Performance* (Chicago: Rand McNally, 1980), pp. 169–227. See also George J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy* 72 (February 1964): 55–59.

detailed level. Adherence to the agreements must be visible to the colluders but, because such agreements are illegal under the Sherman Act, adherence must be invisible to everyone else. To make collusion manageable, the number of firms needs to be small and the terms of the agreement need to be simple. In addition, if the firms have differing interests, possibly as a result of their having different market shares or cost conditions, the would-be colluders may find it difficult to find terms on which they can agree. For instance, if one network held several marginal programs but few highly popular ones, it would gain little from warehousing, and side payments might be required to induce it to participate. In addition, since higher-than-competitive prices would entice new firms to enter the market, barriers to entry must exist to prevent potential new firms from offering a similar product and undercutting the prices of the existing ones.

162. An examination of the syndication industry for the presence of these necessary preconditions helps determine the likelihood of collusive warehousing in this industry. The market for syndicated programs is composed of a large number of local markets with widely differing characteristics. The number of programs sold in a given market varies with the number of stations in the market. In addition, since demographics and tastes vary from market to market, different programs will be popular in different markets, and programs' ratings will differ from market to market.[73] In addition, ratings will change over time as new programs enter the market and old ones become outdated. Moreover, the prices advertisers are willing to pay for a given audience size differ with the demographic characteristics of the audience. Thus, the revenues that will be generated by a given syndicated program depend on the many characteristics of the program and the market—and are basically unknown in advance. Given the differences in demand conditions across markets, the specific programs that would have to be withheld for the warehousing scheme to succeed would differ from market to market. Even if there were only a single syndicator, he would not know with any degree of certainty which programs to withhold from which markets. If he withheld a program that would have been sold he would forgo the revenues from the sale of that program. A successful warehousing scheme would appear to be difficult to devise even if collusion were unnecessary and all the other necessary conditions were met. However, to the extent a large fraction of markets had similar characteristics, the withholding process would be simplified.

163. In addition, accomplishing a collusive warehousing plan

[73] The study of Crandall, Noll, and Owen reports that program ratings depend on a large number of program and market characteristics. It also presents evidence that the ratings of off-network programs vary widely across markets. Crandall, Noll, and Owen, pp. 71–72.

would appear to require detailed, frequently-updated agreements with different provisions in different markets. The complex nature of such agreements would tend to make them difficult to reach tacitly. Collusion under such circumstances would probably require explicit negotiation and agreement, and might be highly susceptible to detection. The colluding syndicators would have to consider the gains from their collusion great enough to justify the risk of being found out and prosecuted. Moreover, a study by Owen, Beebe, and Manning suggests that, in the past, the networks may have been able to coordinate their behavior in simple matters such as the number of reruns but not on more complicated issues such as the level of program quality.[74] Warehousing may fall someplace between the extremes. Finally, FCC actions encouraging the entry of new competitors and the expansion of new media technologies such as cable, MDS, STV, and, in the future, DBS and LPTV, have provided or will provide alternatives to the networks, both in the purchase of programming from producers and as a source of programming to independent stations. Thus they have greatly reduced the likelihood that collusive agreements would be successful.[75] In short, the likelihood that the networks would be able to reach and maintain collusive agreements under all these conditions appears remote, even if off-network programs had no good substitutes and the networks held syndication rights to all of them.

164. These factors suggest that collusion among the networks would be difficult. Nevertheless, the Department of Justice, one of the two principal government agencies responsible for antitrust enforcement, indicates that the possibility of tacit collusion cannot be ruled out.[76] While noting the difficulties of coordinating withholding across many separate geographic markets, the Department suggests that crude formulae, based on the number of independent stations per market or the number of available time slots in certain markets, could be used to facilitate collusion.

165. Although the Department of Justice does suggest that the networks would have stronger incentives to "warehouse" than other syndicators,[77] it is worth remembering that, if the networks could

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[74] Bruce M. Owen, Jack H. Beebe, and Willard G. Manning, Jr., *Television Economics* (Lexington, MA: D.C. Heath and Company, 1974), pp. 103–111.

[75] FCC actions facilitating entry or expansion of new video media include *Deregulation of Receive-Only Domestic Earth Stations*, 74 FCC 2d 205 (1979); *Report and Order* in General Docket No. 80–603 (authorization of direct broadcast satellite service), 47 F.R. 31555 (1982); *Third Report and Order* in Docket 21502 (subscription television deregulation), 47 F.R. 30069 (1982); *Report and Order* in BC Docket 78–253 (authorization of low-power television), 47 F.R. 21468 (1982); *Report and Order* in Docket 80–112 (multi-channel MDS), adopted May 26, 1983.

[76] Reply Comments of the United States Department of Justice at 15–18.

[77] *See* Reply Comments of the United States Department of Justice at 19–20 for a discussion of their rationale in this regard.

profit from a withholding strategy such as that described above, so too could existing syndicators. Since the syndication market appears to be moderately concentrated, collusion might also be possible there.[78] Consequently, entry into the syndication market by the networks might in fact reduce the likelihood of warehousing, since it would reduce the level of concentration in that industry.

166. The third and fourth scenarios presented by ICF require further preconditions, in addition to all those described above. As noted above, in ICF's third scenario, control of off-network programs would allow the networks to raise advertising prices higher than they would otherwise. They would lose some advertisers to independent stations, but because independents' advertising revenues would rise the independents would be able to pay more for off-network programming. The networks would then be able to raise off-network program prices and recapture some of the lost advertising revenues.

167. To affect advertising prices, the networks must be able to collude in setting advertising prices, as well as in the purchase and sale of programming. We have noted the difficulties of collusion in the sale of programs above; similar difficulties would confront an attempt to collude in the advertising market.

168. In a study submitted with CBS's reply comments, Joskow points out that even if the networks could succeed in raising advertising prices, there would be many leakages that would reduce the amount of their advertising revenue loss that the networks would be able to recapture from independent stations.[79] Only some of them are noted here. First, if advertisers consider that other forms of advertising are good substitutes for television advertising, increases in television advertising prices will merely cause advertisers to shift to radio, newspapers, or other media. Second, if advertising rates rise, some advertisers will simply choose to advertise less. Third, network stations must hold a large enough share of the advertising market so that, if they reduce the supply of advertising time to raise the price, the independents cannot counteract the effect by increasing their own supply of advertising.[80] At the same time, the smaller the independents' share the smaller the gain to the networks from

[78] *See* ICF, Vol. 3, Appendix 4, pp. 175–242; Joskow, pp. 10–11, Table 8.

[79] Joskow, pp. 35–47.

[80] Joskow points out that the networks' share of total television advertising is only about 40 percent, which is probably too small to give them substantial power over advertising prices. So increasing the level of television advertising prices would have to be accomplished through the affiliates and O&O's. It is not clear how the networks would induce affiliates to participate in such a strategy, since the affiliates would only lose advertising revenues and would regain nothing in the syndication market. There are only three markets with three O&O's, and there are enough independents in these markets to make it unlikely that the O&O's could exercise market power. Indeed, Fournier and Martin present evidence that local stations do not exercise market power in the sale of non-network advertising. Gary M. Fournier and Donald L. Martin, "Does Government-

increasing the prices independents must pay for programs. Fourth, off-network programming must make up a large percentage of independents' total programming. While the prices of all television advertising will rise, the networks will only be able to recapture gains from increases in advertising revenues for advertising shown during off-network programs. Fifth, as Joskow points out, the price of a program is determined by the difference between its advertising revenues and those of the best unshown program. As advertising prices rise, the revenues of both programs will rise proportionately. So the increase in program prices will only be a percentage of the increase in advertising revenues. Clearly, in the process described above leakages occur at several stages, so that the networks can extract only a fraction of the increase in independents' advertising revenues. Joskow presents calculations demonstrating that even under very favorable assumptions, the networks could at best break even pursuing this strategy. The major effect would be that independents would gain at the expense of advertisers and consumers. This scenario thus appears to be, as Joskow asserts, "a theoretical curiosity that has no empirical significance."[81]

169. In the fourth case presented by ICF, the networks would carry the withholding strategy further than would a syndicator who did not sell television advertising because they would benefit from independents' losses of audiences and advertising revenues. In this scenario, higher program prices would cause independents to show poorer-quality programs and thus lose viewers, reduce hours of operation, or both. Networks and affiliates would benefit both from larger audiences and from a reduction in the supply of audience-minutes of advertising in the market, which would raise advertising rates per viewer. For networks to be able to affect independents' audiences and advertising revenues in this manner, all the conditions required for warehousing must hold. If there are a large number of programs of equal value available to replace the last unshown program, the networks could not raise program prices and could not cause the independents to lose viewers. In addition, as in the case described above, there must be no good substitutes for television advertising, or increases in television advertising prices will cause advertisers to desert the medium.

170. If the networks withheld programs that otherwise would have been shown, the effect on advertising revenues would have to be large enough to outweigh the loss in syndication revenues from the programs withheld from the market. However, only some fraction of the audience lost to the independents would accrue to the network withholding the program; the rest would turn to affiliates of

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Restricted Entry Produce Market Power?: New Evidence from the Market for Television Advertising," 14 *Bell Journal of Economics* (1983), pp. 44–56.

[81] *Id.*, p. 44.

other networks, other independents, cable systems, or other forms of video entertainment, or would simply do something else with their time. ICF claims that the primary effect of warehousing would occur in the 4:00–8:00 p.m. time period, since that is the only period when independents depend primarily on off-network programming. However, the evidence shows that, except for a half hour of news, the affiliates show almost no network programming during that time period. Thus, most of the gain from warehousing would accrue to the affiliates, not to the networks, except in the case of the few owned-and-operated stations. No mechanism is presented whereby the network could extract the affiliates' gains.[82]

171. ICF also argues that increases in program prices might cause independents to reduce their hours of operation or cease operation entirely. The only time period when they might cut back their hours as a result of higher-priced off-network programming is the period from 11:00 p.m. to 1:00 a.m. But Joskow points out that in a survey of independent stations, off-network programming made up only 25 percent of the programming shown during this period, and that first-run programming and movies appeared to be very good substitutes for off-network programming during this period.[83] Warehousing would not likely be successful during this period, therefore, and even if it were, audiences are sufficiently small that there would be little effect on either independents' or networks' revenues.

172. Past experience may provide useful evidence concerning the liklihood that networks would withhold programming from syndication. The only empirical evidence regarding the networks' actual acquisition of syndication rights and warehousing of programs comes from the period before the rules became effective, just over ten years ago. Prior to adoption of the rules, the networks acquired only a small percentage of the syndication rights to off-network programs.[84] None of the commenters asserts that the networks warehoused programs during this period. Some commenters state that the networks' failure to warehouse programs at that time shows either

[82] It is useful to remember that the third and fourth scenarios discussed above are the only cases that have been presented in which the networks might have greater power or incentive than any other syndicator to manipulate the syndication market. If these effects are considered unlikely, then any remaining possibility of warehousing is as likely to occur through existing syndicators as through the networks.

[83] *Id.*, p. 50, Table 16.

[84] NBC in its comments asserts that the networks acquired syndication distribution rights in only about 25 percent of producer-supplied prime time entertainment series programming in the period immediately before the rules were adopted. Comments of National Broadcasting Company, Inc., p. 207. ABC states that in its experience, syndication rights were almost never acquired if the producer had a syndication arm. Comments of American Broadcasting Companies, Inc., p. 114.

that they were unable to gain control of syndication rights or that it would not have been profitable to warehouse programs.[85] Thus, those commenters think that this provides good evidence that they would not do so if the rules were rescinded. ICF, on the other hand, states that the networks' behavior prior to adoption of the rules is irrelevant because the independents have become much more profitable since the introduction of the rules. Consequently, they assert, revenues from syndication have risen and the potential returns from warehousing are greater than in the past. ICF also argues that, before adoption of the rules, scrutiny by the Commission and the Department of Justice deterred the networks from engaging in warehousing.

173. It should be noted here, that if the potential revenues to be derived from withholding programming are higher, then the cost of acquiring syndication rights will also be higher than in the past, unless the networks can obtain those rights at below-market prices. We have noted above that it is unlikely that networks will be able to extract such concessions from program producers. In addition, the ratio of stations' profits to expenditures for purchased programs appears to have remained about constant between 1970 and 1980, suggesting that no great increase in the potential for syndication profits has occurred.[86] In 1967 domestic syndication sales had already reached $139.2 million, which suggests that if warehousing were a profitable strategy under any circumstances the potential returns were already far from negligible.[87] There is, therefore, no obvious reason why a withholding strategy would be profitable in the future if it was not in the past. Indeed, since the networks have a smaller share of the television audience than in 1970, less of the benefit of diversion of audiences from the independents would accrue to them. And, as a consequence of the current rulemaking, the networks are now subject to scrutiny at least as intense as before the adoption of the rules. Hence, the fact that warehousing did not occur before the adoption of the rules appears to provide useful evidence that it probably would not occur if the rules were rescinded.

174. Several commenters assert that the increasing numbers and profitability of independent stations since the adoption of the rules provide evidence that the rules have been effective and beneficial.[88] In fact, however, the number of independent television stations appears to have increased in the years 1967–1971 and again

[85] These commenters include CBS, Inc.; Franklin M. Fisher, William J. Baumol, and Paul L. Joskow in appendices to CBS's comments; and Alfred E. Kahn.

[86] Joskow, p. 16.

[87] Reply Comments of ABC, p.9.

[88] These include the Association of National Advertisers, Inc.,; the Communication Commission of the National Council of Churches of Christ in the U.S.A. and the Office of Communication of the United Church of Christ; INTV; Metromedia, Inc.; and Viacom International, Inc.

after 1977, but not in the years immediately following adoption of the rules.[89] In any case, implementation of the All-Channel Receiver Act, the expansion of cable, which improved reception of UHF stations, growth in demand for television advertising, and the Prime Time Access Rule undoubtedly contributed to independent stations' success during this period. While the availability of attractive programming has no doubt been a factor in independent station growth over the last decade it would be extremely difficult to disentangle the effects of all these factors and to what extent the financial interest and syndication rules affected the growth of independent stations.

175. *Other Effects on Television Stations.* Some commenters have asserted that repeal of the rules would have effects on television stations other than through warehousing. For instance, comments by Fisher and Baumol, attached as appendices to CBS's comments, assert that if the rules reduce the efficiency of program acquisition by the networks, they will cause network programs to have lower quality or higher costs than they would have otherwise. This will reduce affiliates' audiences and revenues. In the long run, they state, the effect will spread to independents as the quality of off-network programming available in syndication declines. The effect of this will be a long-term loss of audience by broadcast television to other media. Although we have no empirical estimates of the size of this effect, it is undoubtedly detrimental to the entire broadcast television industry.

176. In addition, as noted above, entry of new competitors into the syndication industry might hold down costs of syndication and reduce prices of syndicated programming to television stations. Again, by preventing the networks from entering this industry, the rules may keep program prices higher than they would be otherwise and may adversely affect all television stations.

Effects of the Rules on Television Networks

177. This section considers the effects of the financial interest and syndication rules on the three major broadcast networks. The following section examines the likely effects of the rules on the prospects for forming additional major networks.

178. In considering the effects of the rules, it is helpful to recall the recent changes in the competitive position of the networks. As discussed above, at the time of adoption of the rules in 1970, the three broadcast networks held a commanding share, over 90 percent, of the video audience. Together with their affiliates they captured about 92 percent ($2.6 billion) of television advertising revenue. Independent television stations had 9 percent of the audience and

[89] Joskow, Table 1; ICF Exhibit 1–22.

about 9 percent of the revenues. Only 2500 cable systems existed; pay systems were almost nonexistent.

179. In the intervening years competitors have made significant inroads into the broadcast networks' position. The number of independent television stations has almost doubled in the past decade, and their revenues have increased more than threefold. By 1980 the number of cable systems had increased by 70 percent and the number of subscribers had grown by 250 percent. Both continue to grow rapidly. In the mid-1970's, cable networks came into being, providing programming to cable systems via satellite. Over-the-air subscription television and multipoint distribution service have experienced significant growth in major markets. The growth of these other services has eroded the networks' share of the video audience to 80 percent.[90] Even more telling is the decline in the proportion of video product purchased by the networks over this period, which has fallen from 74 percent to 54 percent since adoption of the rules. The purchasing power of the other video media has, thus, grown substantially.

180. Most observers expect the growth of these non-network video outlets to continue; in addition, new technologies, such as direct broadcast satellite (DBS) systems and low-power television, are expected to provide many additional channels in most localities. DBS in particular will provide programming on a national or regional basis, in direct competition with the broadcast and cable networks. Thus the networks' share of the total audience appears likely to continue its decline. As shown in Table 7 *infra*, industry analysts predict that by 1990 the network share of the prime time audience will lie between 59 percent and 75 percent. Revenues from pay cable are predicted to reach $8 billion by 1990, over and above an estimated $6.5 billion for basic cable. These estimates compare favorably with the $15 to $20 billion combined revenues predicted for the networks. Of course all predictions of the future contain some uncertainty, as recent setbacks experienced by pay television stations show.[91] Nevertheless, the effects of the rules must be considered in the context of a market in which the dominance of the networks is clearly eroding, and additional networks promise to provide major alternatives in the distribution of programming.

181. As discussed above, most analysts consider a primary effect of the rules to be the prohibition of voluntary arrangements to distribute the risk of program production. Since it is impossible to predict before a program is produced whether it will be successful in syndication or even go into syndication, syndication rights or

[90] Evidence submitted at the oral proceeding by ABC shows network audience in 36 channel cable homes in one market (Tulsa) down to a 56 percent prime time audience share.

[91] *Business Week*, May 16, 1983, p. 28.

financial interests in program production are highly risky assets. If the networks are in a better position than other entities to bear this risk, then it will be more efficient and less costly for the networks to hold these rights. If the networks are prohibited from purchasing them, the cost of programming to the networks will be higher and their competitive position relative to other program sources will be weakened. The Network Inquiry Special Staff and subsequent analysts have concluded that in fact the networks stand in a unique position to minimize the risks associated with new television series.[92] This is true for a number of reasons. First, they can ensure exposure of the programs through an efficient set of outlets. Second, they have information on viewers' tastes that gives them an unusual ability to judge the likely success of programs. Third, they can pool the risks of a large number of programs, so that the failure of any individual program will not cause them severe harm. Finally, they can choose programs and schedule them to maximize the value of the entire lineup.[93] Small producers with only one or two programs lack the risk-pooling capacity of the networks; banks or other financial institutions cannot judge as well as the networks the potential success of new programs.

182. In many situations, as a consequence, syndication rights may in fact have greater value to the networks than to any alternative holder, and prohibiting the network from holding them will cause the cost of programming to be higher and, in extreme circumstances, may prevent programming from being produced that might be produced otherwise. If less investment in programming occurs as a result, or if networks choose less risky programming than they would if they could obtain syndication rights, then the quality and diversity of network programming, and the networks' competitive position relative to the other media will be harmed.

183. Shooshan and Jackson assert, plausibly, that the rules handicap the lowest-rated network in attempting to improve its position relative to the more popular networks. The network may wish to buy what it believes to be high-quality programming in order to increase its audience. It will value the syndication rights to such programming more highly than would the producer or other holder of the rights, who would discount their value because the programs would be shown on a low-rated network. Thus the network will be deprived of an opportunity to receive the rewards from a risk it is willing to take, and will be less likely to take the risk as a consequence.

184. A further effect of the rules may be to prevent the networks from entering into lines of business that they are naturally

[92] Network Inquiry, Staff Report, Vol. II, pp. 616–17; Franklin M. Fisher, CBS Vol. II, Appendix E, p. 3; William J. Baumol, CBS Vol. II, Appendix F, p. 12.

[93] CBS, p. 127.

positioned to enter and where they might operate more efficiently than other entities and might provide additional competition. Since the expansion of many new delivery modes makes the future direction of the home video industry extremely unpredictable, a sensible strategy for any participant in the market would be to hedge his bets by experimenting in various markets and with various delivery methods. The rules inhibit such efficient adaptation to changes in the market by prohibiting, or making unnecessarily costly, many reasonable ventures. For example, they prevent network owned and operated stations from syndicating their own, locally-produced programs. They prevent, for instance, CBS Records from syndicating video productions of their recording stars' performances; and they prevent a network publishing subsidiary from distributing audio-visual "tele-courses" and associated texts, through noncommercial stations. Because of the rules, programs produced and owned by networks can be distributed to cable systems but not to broadcast stations, except through the network feed, which deprives broadcast audiences of access to the programming.[94] It is difficult to see how the domestic program production or syndication markets could be harmed by any of these practices. In each case syndication could be performed by some other entity, but in cases where a network is best positioned to perform the job an efficiency loss to society is incurred if it is not allowed to do so.

Effects of the Rules on New Networks

185. The financial interest and syndication rules as currently drafted also would apply to new broadcast networks, and to the extent that the rules hinder the development of new networks they limit competition with the established networks. Companies that now engage in syndication would be barred from networking, unless they ceased their syndication activities.[95] Such companies might in fact be ideally positioned to enter networking, and requiring them to choose between networking and another important line of business may in fact provide a major deterrent to entry into networking.

186. Of particular importance, the rules could inhibit the formation of so-called hybrid networks, that is, networks serving both broadcast and cable affiliates, by deterring existing cable networks from distributing programming to broadcast stations. Viewers in areas not served by cable would be harmed, and if the cable network could not survive serving only cable outlets, cable viewers would also lose. Since a new network would probably have only a few outlets in the beginning, and in fact might never reach

[94] Shooshan and Jackson, pp. 28–33.

[95] The Christian Broadcasting Network had to receive a waiver from the Commission to distribute programming to stations by satellite, and is limited in the number of hours per week it can broadcast by the terms of the waiver. *Id.*, p. 27.

the coverage of existing broadcast networks, the ability to distribute programming through more than one medium might be extremely important for attaining the scale necessary to operate efficiently.

187. In addition, if a new network had the option of supplying either a broadcast station or a cable system in a given locality, competition between the two outlets for programming would improve the terms on which the network could sell the programming. Preventing cable networks from serving broadcast stations in effect protects cable system operators from competition for programming.

188. In the long run, as the foregoing suggests, an effect of the rules, as presently drafted, could be to create incentives that cause new networks to use non-broadcast means of distribution. If so, conventional broadcasters will be deprived of sources of programming that might otherwise be available, and audiences will increasingly turn to cable, DBS, and other media. To the extent that the rules affect the choice of media they prevent the broadcast networks from competing fairly with the emerging media. They also distort the market in ways that prevent programming from being distributed in the most efficient manner and by the means preferred by viewers. These effects of the rules were unforseen, indeed unforeseeable, at the time of their adoption. It would not be surprising if the rules had additional unintended and unforeseen effects reducing the efficiency of the market and service to viewers.

IV. *CONCLUSIONS AND NEW REGULATIONS*

189. In adopting the financial interest and syndication rules, the Commission stated that the rules could "readily be changed or rescinded" if they failed to achieve their intended purpose.[96] We have sought in this proceeding to determine if in fact these rules have achieved their intended purpose and have concluded that, in many respects, they have not.

190. When the rules were adopted, the Commission indicated its belief that this form of regulation would contribute to both the diversity of programming available to the viewing public and the competitiveness of the television program production and distribution systems. At that time, the Commission focused almost all of its concern on the relationships between the networks and the packagers and producers of network entertainment programming. In the present proceeding, it is also argued with considerable force that regulation is necessary to structure the relationship between the networks as potential program syndicators and the independent television segment of the broadcasting industry. Because the concerns addressed when the rules were adopted and the new rationales for their continuation are in many respects substantially different, it is appropriate that they be addressed separately.

[96] 23 FCC 2d at 397.

Regulation of Network/Producer Relationships

191. The set of concerns principally focused on in adopting these rules had to do with redistributing economic power from the three national television networks to that group of companies that produce and package television entertainment programs. In adopting the restrictions imposed by the rules, the Commission indicated its belief that the economic strength and ability of the program suppliers "profitably to operate" would thereby be "greatly enhanced"[97]; that the rules would insure the availability of independently produced, first-run syndicated prime time programming[98]; that a "conflict of interest" would be eliminated that had caused the networks to select for exhibition programs in which they had a financial interest, presumably in place of superior programs in which they had no interest[99]; and that diversity and competition in the program supply markets would be fostered.[100] It has also been argued that the rules were intended, in some measure, to shift creative control over programs exhibited on the networks to the program suppliers.[101]

192. Shortly after the rules were adopted, independent scholars began to criticize various aspects of the economic reasoning that led to their adoption.[102] One study of the rules, published in 1978, concluded that "the Commission seriously misunderstood the economic realities of the program procurement process, and as a result,

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[97] 23 FCC 2d at 398.

[98] 23 FCC 2d at 389, 397.

[99] 23 FCC 2d at 398.

[100] 23 FCC 2d at 398.

[101] 23 FCC 2d at 397. *But see*, n. 107, *infra*.

[102] Two articles by R.W. Crandall focused directly on the rule, while work by various others suggested that the market conditions assumed by the Commission did not in fact obtain. Crandall's research suggested that when networks purchased syndication rights to programming, they paid program producers the market value of those rights. He also found that networks made their decisions on retaining series without "favoring" programs in which they retained a financial interest. Finally, Crandall found no evidence of monopsony power in the program acquisition market. See R.W. Crandall, "The Economic Effect of Television-Network Program 'Ownership'", 14 *Journal of Law and Economics* 385–4–2 (1971) and "FCC Regulation, Monopsony, and Network Television Program Costs," 3 *Bell Journal of Economics* 483–508 (1972). Additional information on syndication markets is provided in R.G. Noll, M.J. Peck, and J.J. McGowan, *Economic Aspects of Television Regulation* (Brookings Institution: Washington, DC, 1973), pp. 63–67. They show that before the rule the networks' share in syndication profits was low, and they estimate that program producers extract approximately one-half of the "rents" associated with their product. The latter point suggests that any network monopsony power is limited. Finally, B.M. Owen, J.H. Beebe, and W.G. Manning, Jr., *Television Economics* (D.C. Health and Company: Lexington, MA, 1974), pp. 28–31 examined the program production market and found it characterized by easy entry and an ample supply of programming inputs. This suggests that whatever mix of programming is demanded will be produced, without regulatory intervention being needed.

adopted rules which had no chance whatsoever to achieve their intended result."[103] In the mid-1970's, the Commission had also come to believe that its network regulations were in need of a thorough review and therefore commenced the proceedings in Docket 21049 to complete that process.[104]

193. In the course of that proceeding a detailed analysis of the network/program supplier relationship was undertaken. Numerous participants in the process were interviewed, extensive data relating to the development of network programming was reviewed, and the contract files for a large number of network programs were examined. At the conclusion of this inquiry, a staff report was prepared and released for public comment. This report, generally agreeing with the earlier scholarly research, concluded that the rules were based on incorrect perceptions of the nature of the economic markets involved, would be ineffective in accomplishing their stated goals, and should be eliminated.

194. With respect to the Commission's attempt to readjust bargaining power between the networks and the suppliers of programming, the *Report* made the following comment:[105]

> One allegation is that networks employ bargaining power to exact "unfair" or "excessive" terms or "low" prices from program suppliers.[8] Such allegations should not be of concern to the Commission, for they raise only the question whether program suppliers have been sufficiently compensated for their work. The networks, even if exercising complete monopsony power, cannot pay less for a program than the value the suppliers' resources have in their best alternative use. The assertion that networks can or will acquire programs for less than their costs simply will not withstand scrutiny. Once it is understood that networks, no matter how powerful, cannot purchase programs at rates that are unprofitable for suppliers, contentions that contract terms harm suppliers can be seen for what they are—allegations that suppliers are not paid as much as they would prefer. Most importantly, the public interest—the interest of viewers in receiving numerous, diverse, quality programs from which to choose—is not implicated by such contentions. Moreover, even if viewers were aided, in some indirect manner, by increasing producers' income at the networks' expense, this redistribution of profits cannot be achieved without regulating substantially all terms, including the license fee, of network program supply contracts.
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> [8] This allegation is often expressed in the form of a complaint that networks favor those programs in which they obtained . . . [financial interests]. Unless some policy is violated by the acquisition of these rights, however, there is no reason to fear or prohibit networks favoring programs in which they have been obtained. Thus, networks presumably favor programs for which they obtained low license fees or which they expect to attract large audiences. One cannot urge

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[103] T. Schuessler, "FCC Regulation of the Network Television Program Procurement Process: An Attempt to Regulate the Laws of Economics?" 73 *Northwestern U.S.L.R.* 227 at 229 (1978).

[104] *Notice of Inquiry in Docket 21049*, 62 FCC 2d 548 (1977); *Further Notice of Inquiry in Docket 21049*, 69 FCC 2d 1524 (1978).

[105] Network Inquiry Staff Report, Vol. II, p. 793 (footnote omitted).

that this favoritism be prohibited without demonstrating that public policy is violated by networks obtaining low license fees or large audiences.

195. Neither in the responses to the Final Report of the Network Inquiry Special Staff[106] nor in the responses to the present proceeding was there any significant new evidence or analysis presented to rebut the conclusions reached by the network inquiry staff. Indeed our review in the present proceeding persuades us that the earlier criticisms of the rules, in terms of their impact on network/supplier relationships, were essentially correct. In our analysis of the responses to this proceeding we have found no credible evidence that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market. We have found no credible argument presented as to why network financial interests in programs would lead to an improper or inappropriate selection of programs for network broadcast. While it is difficult to evaluate the impact of the rules on creative control, it is apparent that, as the principal purchasers of network programming and as licensees of stations using this programming and as responsible agents for affiliated stations that broadcast this programming, the networks have continued to maintain a significant and not improper control over the programming obtained for network exhibition.[107] Finally, we do not believe that the Commission has a proper role to play in allocating revenues or profits between the networks and those who supply programming for network use, in the absence of evidence or reason to believe that by doing so the value of the television service received by the public will be increased. Not only do we fail to find evidence that such a shift would benefit the public but it is unclear that the existing rules would cause such a shift to occur even if it were desirable. As long as program supply markets remain competitive, and it is undisputed that they were competitive before the rules were adopted and remain competitive today, the possibility of rules of this type lifting profit levels among the program suppliers and packagers above the normal competitive level is remote. To the extent the rules, by excluding efficient sources of financing from the market, create barriers to market entry or create pressures for smaller producers to join with larger firms, the rules are operating in a manner contrary to their stated purpose and serve no valid public purpose.

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[106] See *Id.* at pp. 805–809 for a review of the response to the Report of the Network Inquiry Special Staff.

[107] With respect to the issue of creative control, it should be noted that, in initially proposing these regulations, the Commission stated directly that "Nothing in the proposed rule is intended or should be construed to limit or modify the overall program responsibility of licensees for all matter broadcast through their facilities." *Notice of Proposed Rulemaking in Docket 12782*, 45 FCC 2146, 2163 (1965).

196. We appreciate that the market into which entertainment television programming must be sold is a concentrated one and that for some particular types of programming there historically have not been more than three significant buyers. Nevertheless, the regulations in question cannot fundamentally change the bargaining power between the parties.[108] And, while the number of purchasers is limited, competition for programming is intense and no evidence of collusive conduct among the buyers is evident.

197. In sum, the rules, as they affect relationships between the networks and the suppliers of programming, appear to fail as mechanisms to increase network or first-run syndicated program diversity and fail to foster competition in the program supply and distribution markets. Furthermore, the rules risk creating incentives for greater concentration in the supply markets and introduce possible inefficiences into the creation and distribution process which could result in reduced total investment in programming. Although there are other reasons for our decision to retain some control over network participation in the syndication of off-network series programs, which are discussed below, we no longer find any reason for limiting non-controlling or passive financial interests that the television networks may obtain in the programming they acquire for network exhibition. Further, no rationale appears to remain, given the analysis above, for any restrictions on network participation in the syndication of programming in foreign markets or for other kinds of restraints on ancillary rights which the networks may invest in and receive a return from in connection with programs they exhibit.

Network Participation in Program Syndication

198. The above discussion, relating to the regulations as they impact on the network/supplier relationship, addresses most of the concerns that moved the Commission to adopt both the financial interest and syndication rules. Another rationale for the rules, touched on only briefly when the rules were adopted[109], but now the central focus of much of the current debate, relates to the question of whether the networks through participation in the syndication of programming could competitively damage independent television

[108] The logic of the observation that the rules cannot fundamentally alter the bargaining power between the parties appears to have received grudging acceptance even on the part of those who argue for continued regulation. The massive ICF, Inc. study, prepared for the Committee for Prudent Deregulation, begins by taking note, without disagreement, of the previous studies which concluded that, given the competitiveness of the supply markets, "rules governing the network relationships with suppliers are not likely to have significant economic effects *in the program supply market.*" (Emphasis in original) (paper 2, p. 1–1). *See also* oral proceeding transcript p. 204.

[109] 23 FCC 2d at 394.

stations' operations in order to protect their affiliates and their own stations from competitive injury or otherwise cause public injury through manipulation of the syndication market.

199. The most refined argument in this regard is that presented by the Committee for Prudent Deregulation, which not only contends that growth of the independents in the last decade is a direct result of the rules, but also presents a complex theory of how repeal of the syndication rule could lead to a situation detrimental to the continued prosperity or even viability of independent stations. That so-called "warehousing" theory essentially postulates that networks would withhold certain off-network series, of a type that is normally broadcast by the independents during the 4–8:00 p.m. daypart, their most lucrative period, in order to increase the price of those programs which are aired or advertising rates.

200. CPD's theory is based on an intricate series of assumptions, which we have already described in detail. For the reasons set forth earlier, we find it unlikely that the postulated scenario would occur. For example, the networks would have to acquire syndication rights in virtually all off-network series programming. If the networks remain competitive buyers of television programming, however, the chance of this happening is small. Nothing in the record of this proceeding suggests that this outcome is plausible. In addition, the theory requires that each network possess monopsony power or that they be able to collude and maintain a collusion. For the host of reasons discussed earlier, we conclude that it is unlikely that the networks could do so. Further, networks would have to be able to control the prices of recent off-network series without fear that buyers would switch to alternative programming. In fact, however, surveys of broadcasters indicate that older series, sports, feature films, and locally produced programs can serve to some extent as alternatives, thereby exerting a constraining influence on the price of recent off-network series. Finally, CPD's warehousing theory rests, in part, on the assumption that television advertising rates are unconstrained by other advertising media. That assumption is, at best, unproven and is becoming less viable with the increase in alternative video services. In short, each necessary assumption is questionable, and when taken together—as they must under the theory posited—the probability of warehousing occurring becomes slight.

201. It is noteworthy that this theory is concerned only with the networks' conduct as syndicators. The networks' financial interest or lack thereof plays no part in this scenario. Accordingly, since the viability of the independents is the only vestigial justification for retaining the rules, we conclude that this provides no justification for a continuation of the financial interest rule. The financial interest rule has failed to increase the independent program supply, has no effect on program diversity or quality, has not decreased

network control over program content or creativity, does not represent an inherently undesirable conflict, and appears to present no threat to the well-being of the independents.

202. We believe there is room for significantly reducing the coverage of the present rule, without jeopardizing any public interest concern. As noted above, there is no reason to exclude networks from the foreign syndication market. With respect to the domestic syndication market, we have tentatively concluded that some restrictions may be necessary because we cannot be completely certain network participation in the syndication market would not result in competitive injury to the independent television segment of the industry and thus to the viewing public. While the chances of such injury, based on the above analysis, do not appear to be large, we are entering a period in which the increasing economic strength of the non-network segment of the television industry is making the television industry significantly more competitive and increasing the programming options available to the public. It is extremely important that progress in this direction not be impeded. If the CPD scenario occurs, it is possible that networks, acting as syndicators of off-network programming would fail to support these developments as vigorously as unaffiliated syndicators. While our economic analysis suggests that this would generally not be a profit maximizing course of conduct to follow, it is nevertheless a matter of sufficient concern to warrant some continued regulatory involvement. We accordingly believe a focused restriction on network participation in the syndication of off-network prime time entertainment programming should be maintained to address the residual concerns that continue to exist in this area, as well as to provide a transition to a less regulated, while at the same time more competitive, environment.

203. The revised syndication rule, which is patterned in large part after the proposal of the Department of Justice[110], is limited in scope. It covers only those programs and practices that could conceivably be employed to harm the independents if the activities predicted by CPD's warehousing theory were actually to take place. Thus, the rule is expressly limited in application to the three major national networks.[111] It applies only to prime time entertainment

[110] *See* Reply Comments of Department of Justice at 30. We note that, because the antitrust consent decrees that bind the three networks are generally more restrictive than the Commission's rules, the networks will remain constrained until changes in these decrees are made. The analysis developed in this proceeding suggests that changes in them ought to be made. We do not believe, however, that the consent decrees should constrain this Commission in carrying out its own responsibilities. *Cf. Second Computer Inquiry*, 77 FCC 2d 384, 492 (1982). ("Our basic premise is that the consent decree should not constrain this Commission in the adoption of regulatory policies necessary for carrying out our mandate under the Communications Act.")

series, upon which the independents rely for off-network stripping. And it applies only to domestic distribution of these series to television broadcast stations for non-network television exhibition. Participation in the distribution of programming, other than off-network programming, is not restricted since here the potential benefits of additional competition and program sources would appear to far outweigh any potential concerns relating to increased network influence.

204. To reduce any possibility of warehousing, a network will be required, within six months of a series completing its network exhibition run, to transfer all rights in that series it may hold relating to its syndication, to an unaffiliated[112] syndicator. In addition, no later than the end of the fifth year of a network series run, the network will have to transfer all syndication rights for programs in that series to an unaffiliated syndicator. The language of the rules, as proposed is set forth in Appendix A. Our objective here is not to attempt to cover every conceivable aspect of network participation in non-network distribution but to draw a line between those interests that are reasonably necessary to participation in network broadcasting and which may lead to greater investment or efficiency and those interests that are most likely to lead to injurious activities. In disposing of all rights related to syndication, the network shall retain no active interest in the syndication of the program and shall be prohibited from imposing any conditions, terms, or restrictions over the manner by which a program is syndicated.[113] For example, the networks are forbidden to choose a

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[111] The existing rules (§73.658(j)(4)) cover all networks that offer "an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States." The rule was intended to cover mainly the three major networks. See 25 FCC 2d at 333. The actual language of the rule, however, was more inclusive, and is therefore being revised here to be clearer in its coverage. For some of the background concerning why these revisions are considered desirable, see *Christian Broadcasting Network, Inc.*, 50 RR 2d 359 (1981).

[112] In using the term "unaffiliated" we intend a complete separation of ownership and control. Other than the passive interests that the networks may maintain, there should be no common ownership. This would not, however, preclude the transfer of syndication rights to a firm that is both a syndicator and the owner of a broadcast station distributing network programming and thus considered a network "affiliate." In general, however, we intend a strict separation of interests. *Compare, for example*, 47 C.F.R. §64.601, note 1 (rule regulating cable TV-telephone company relationships).

[113] Passive financial interests may be retained by the networks when their active syndication rights are disposed of in accordance with the requirements of the rules. It is critical that any interests retained be passive in nature so that the rule limiting network participation in program syndication is an effective barrier to any activity that might raise "warehousing" concerns. Such passive interests have been described as comparable in nature to the interest of a limited partner in a limited partnership, the interest of a nonvoting preferred stockholder in a corporation, or a contractual interest in a residual payment, in that a financial return is received but no general management power exists. At

syndicator on the basis of the time or day part in which the program will be broadcast, the frequency with which it is broadcast, the price that licensees will be charged, or the stations which will be broadcasting the programs. To ensure that these requirements are met, the networks will be required to file, within 30 days after each sale or transfer, a notice of such sale or transfer with the Commission.[114] The network shall be required to certify, in this notice, that the sale was consistent with the requirements of the Commission's rule. It is the Commission's intent that the networks comply with the spirit and purpose as well as the letter of the rule.

205. We recognize that rules of this type are subject to various types of technical criticisms for their potential inability to address every market practice or situation that might be hypothesized as well as for their constraints on practices that are otherwise reasonable and non-threatening. Clearly, definitional and coverage issues could be resolved by simply making the regulations significantly more or less inclusive. Because there are market factors which themselves present obstacles to warehousing and create incentives that weigh against many of the anticompetitive strategies postulated, what we seek here is a narrow rule to provide only an additional measure of protection. Some have argued that the programming involved is too varied in its characteristics for a rule to trigger a sale of the syndication rights either by reference to some fixed time period (i.e., as in the five year rule) or by reference to some discretionary act by the network (i.e., the six month rule).[115] In this regard, the rule proposed appears to us to fairly target the area of concern. The six month period specified would appear to provide adequate time for the requisite syndication arrangements to be consummated after a program has completed its network run and the five year period sets an outer bound by which rights in the more popular programs would have to be made available for syndication. In neither instance, however, do we anticipate that all or even many of the transactions required would be consummated in the "fire sale" atmosphere of the last days permitted by the rules.[116] Parties disagreeing with our view that the coverage of the rules is correct,

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this point, we see no need to prohibit or require the use of any particular form of interest or limit the percentage of ownership as long as such interests conform to the basic requirement that they be passive in nature and preclude network control or participation in the syndication process itself. What we do seek here is the most effective means of ensuring a separation between "interest" and "control" consistent with the above described rule.

[114] This will permit the Commission to monitor the forced sales and will give the Department of Justice the opportunity to monitor the networks' behavior for any anticompetitive practices.

[115] See CPD reply comments p. 82.

[116] Particularly with respect to the five year provision of the rules, it is important to note, as a number of the commenting parties do, that "after the third year or so, if the show is still successful, and despite the original terms of the contract . . . the balance of power shifts considerably to the producer." ICF, Vol. 1, 1–16.

however, are encouraged to provide constructive criticism so that if alterations are necessary they can be incorporated before the rules are finally adopted.

206. Our decisions to rescind the financial interest rule and to modify the syndication rule are based on consideration of whether each rule serves the public interest. Each has been tested against the relevant criteria of fostering diversity and competition and with a view to how the service received by the public will be affected. Altering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission. Thus, to characterize increased profitability of producers as a goal of the rule is to misconstrue our true objective. We agree with the Network Inquiry Special Staff when it stated: "Indeed, neither the statutory nor the constitutional mandates under which the Commission operates can fairly be construed to authorize intrusion into the program supply business solely for the purpose of enhancing the profits of suppliers."[117]

207. However, the three networks are in a posture different from that of other participants in the market because programming must pass through them to enter the off-network syndication market. Consequently, they are uniquely positioned to affect their competitors' access to the off-network prime time entertainment programs which have played a major role in enhancing the viability of independent stations. While it now appears unlikely that this special position provides the power or incentive for anticompetitive conduct that could harm independent stations, it is impossible to rule out entirely.[118] The very nature of this special position warrants a cautious Commission approach to deregulation in this area. Thus, we are adopting a revised rule that is narrowly drawn to protect against any network effort to capitalize on their special position but which will not impose significant costs in foregone market efficiency.

208. It is the potential harm to the independents which is the Commission's concern. The independent television sector of the broadcasting industry is an important video service to the public. The very significant growth in the number of independent stations in recent years has contributed greatly to making local video markets more competitive and has increased the public's viewing choices greatly. Not only have these stations provided more entertainment for the public but they have multiplied the voices speaking on issues of public importance. Because we are particularly concened

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Thus, there are market factors that will make the five year period an outer bound rather than a norm.

[117] Network Inquiry Staff Report, Vol. II, 293, at 725–31. The Special Staff found no evidence that the interests of television viewers had been furthered by the rules' effort to redistribute revenues.

[118] See Reply Comments of United States Department of Justice at 15–18 and paragraph 152 *et seq., supra.*

that this progress continue, we believe that the public interest would be served by retaining a modified version of the syndication rule. However, because the networks' financial interest in programs has no direct relationship to the possible warehousing strategies, we find no justification for retaining even a modified version of the financial interest rule. Our modified syndication rule expressly prevents the networks from using their financial interest to act as syndication "brokers," an original concern of ours in 1970.[119] Under our modified rule, a network's continued financial interest in off-network distribution of prime time entertainment series can only be a passive profit-sharing interest, without regard to or control of the terms and conditions of syndication. A network's financial interest and syndication rights are thus entirely separable. Accordingly, so are the rules.

209. Our modified syndication rule is designed to be as minimally intrusive into the program process and as low-cost as possible, while at the same time resolving all fears of network warehousing. As our summary description of the economic context in which these rules operate, which is set forth above, indicates, there are clearly going to be significant changes taking place in the years ahead. These will result in there being more buyers of original programming, more distribution outlets, and more alternatives to either off-network or, indeed, original network programming available for broadcast station use in the years ahead. In a context in which these additional alternatives exist, the rationale for the rules will be eliminated as the warehousing scenarios become increasingly unrealistic. At that point it is appropriate that the rules themselves not continue. By 1990 we believe that this modified rule can be repealed, without any danger to the independents. By then, the independent stations will be much stronger, the networks' audience share will be much lower, and the expanding communications marketplace will make anticompetitive activities in the syndiction market significantly more difficult. Hence, unless the Commission makes a determination that the public interest warrants continuation of the syndication rule, the rule will "sunset" and cease to exist on August 4, 1990.

Comments Requested on Tentative Decision

210. Given the long history of our review of these rules we are confident that our analysis of the effect of the rules in terms of the network/supplier relationship is correct. The studies on this question are numerous. The evidence collected by the Network Inquiry Special Staff is exhaustive and the opportunities for comment on the issue have been abundant. Our conclusions with respect to the proposed revised syndication rule are less definitive, however, and we are particularly concerned that, if regulation is necessary, the mechanical aspects of whatever form of regulation is adopted be

[119] 23 FCC 2d at 398.

workable. For this reason we are issuing this document as a *Tentative Decision* and providing an additional opportunity for comment on it. We recognize that potential problems of application may exist that are not yet resolved or identified by the rules. We ask the commenting parties to help us identify these areas and to propose solutions. For example, we seek suggestions on the question of how to define the end of the network exhibition period. We are also, to this extent granting the petitions requesting further proceedings filed by the Office of Communication of the United Church of Christ, the Communication Commission of the National Council of the Churches of Christ in the U.S.A., Paulist Productions, and the Committee for Prudent Deregulation. Although parties are free, of course, to address any point they want to, our interest and focus at this point is with the syndication issues and the proposed syndication rule. A resubmission or reiteration of arguments already made will not be useful.

211. Authority for adoption of the rule proposed herein is contained in Section 4(i) 301, 303(b), (f), (g), (i), and (j), 307(d), 308(b), 309(a), 310, 312, 313, and 314 of the Communications Act of 1934, as amended.

212. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised the *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments, pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comment must prepare a written summary of that presentation; on the day of the oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1201 of the Commission's rules.

213. Pursuant to the procedures set out in Section 1.415 of the Commission's rules, interested parties may file comments on or before September 20, 1983. All relevant and timely comments will be

considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments.

214. In accordance with the provisions of Section 1.419 of the Rules, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally may do so by submitting 1 copy. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

For further information concerning this proceeding, contact Judith Herman or Marcia Glauberman (202) 632–6302.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Proposed Rule Amendments

Part 73 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Section 73.658 is amended by revising subparagraphs (j)(1) through (j)(4) and adding new subparagraphs (j)(5) through (j)(7) to read as follows:

73.658 Network Syndication and program practices

* * * * *

(j) ***

(1) No television network shall sell, license, or distribute television prime time entertainment series programs that have previously been exhibited on a television network to television station licensees within the United States for non-network television exhibition or otherwise.

(2)(i) A television network shall, no later than 180 days after a network exhibition of a prime time entertainment series is completed, make that complete series available for non-network broadcast exhibition or syndication within the United States.

(ii) In addition, a television network shall, no later than the end of the fifth year after a network exhibition of a prime time entertainment series has commenced, make all programs in that series available for non-network broadcast exhibition or syndication within the United States. On or before the anniversary of that date each year thereafter, all additional programs in the series shall be made available for non-network broadcast exhibition or syndication within the United States.

(iii) All programs shall be made available for non-network exhibition or syndication by transferring all rights held by the network that relate to syndication to an unaffiliated party that is not in any way commonly owned or controlled with the network. The terms of the transfer agreement may permit the network to receive a continuing financial return from the non-network use of such programs but shall otherwise preclude all network control or influence over the terms of license for non-network exhibition, including the specific price charged for non-network exhibition,

the scheduling of the programs and the entities to whom non-network exhibition licenses are granted.

(3) Not more than thirty days following the transfer of non-network exhibition or syndication rights pursuant to the requirement of this paragraph, the network shall notify the Commission of that transfer. That notice shall contain the name of the series, identify the programs involved, identify the party to whom the non-network exhibition or syndication rights were transferred and shall certify that the terms of the transfer comply with the requirements of this paragraph. All agreements relating to such transfers shall be provided to the Commission at the Commission's request.

(4) [*N.B.* This subparagraph is essentially unchanged from the existing rule and was not the subject of this proceeding.] If a network does not timely avail itself of any license or other exclusive right to network exhibition within the United States, the grantor of such license or right to network exhibition may, upon making a timely offer reasonably to compensate the network, reacquire such license or other exclusive right to exhibition of the program.

(5) For purposes of this paragraph and paragraph (k) of this section, the term "network" includes only the major national advertiser supported broadcast television networks (ABC, CBS, and NBC).

(6) For purposes of this paragraph a prime time entertainment series program is an entertainment program which is one of a sequence of 22 or more programs with interconnected plot or substantially the same cast of principal characters any regular episode of which has had network exhibition during the hours of 7–11 p.m. eastern time.

(7) The provisions of §73.658(1), (2), (3), and (6) shall remain in force until August 4, 1990 and shall thereafter be of no further force or effect.

August 4, 1983

Separate Statement of FCC Commissioner James H. Quello Concurring in Part and Dissenting in Part

In re: BC Docket No. 82–345 relating to network television, financial interest and syndication rules.

I wish to make it immediately clear that the Commission's action in this docket does not reflect a decision on my part, tentative or otherwise, that the Commission should adopt this particular proposal. Therefore, I dissent to the characterization of this document as a tentative decision. Nevertheless, I fully concur in seeking public comment on this specific proposal.

I would like to note that in reviewing the comments I shall particularly look for guidance in determining whether a narrow rule such as the one proposed here would adequately ensure that independent television stations continue to have unencumbered access to off-network syndicated programming. Such programming is a staple source of revenue for independent stations, and as such it is an important part of their ability to provide the public with a diversity of viewpoints through their news and public affairs programming.

As I made explicit when the Commission heard oral presentations

on this subject, I support the concept of a compromise where the networks are not unduly restricted from participation in any market so long as the Commission continues to protect the valid interests of the independent stations. Putting this proposal out for comment will, in my view, help the Commission focus on whether a narrow approach such as is presented here can meet that goal. My support of this action should not be interpreted as suggesting that my further consideration of these matters will be limited to the boundaries of this proposal.

SEPARATE STATEMENT AND PARTIAL DISSENT OF COMMISSIONER HENRY M. RIVERA

RE: BC DOCKET 82–345—Network Financial Interest and Syndication Proceeding.

With the exception of the sunset provision, I support the Commission's tentative decision to narrow the existing financial interest and syndication rules. The substantial record compiled to date persuades me that the primary public interest goal furthered by present restrictions is the continued growth and vigor of the independent television stations. These stations are an integral component of the television diversity presently available to the American public; unimpeded access to lifeblood programming by the independents ensures their continued strength, thereby promoting the widest possible dissemination of ideas from diverse and antagonistic sources.[1]

At this juncture, I believe the proposed new syndication rules, with their associated structural restrictions on network financial interests and special reporting requirements, are reasonably calculated to preserve the independent stations' open and unrestrained access to necessary off-network programming. Given the serious consequences that would flow from a misstep in this complex area, however, subjecting the proposed rule revisions to the crucible of public comment is critical to a sound resolution of this proceeding. While reasonable people may differ about the magnitude of the risk posed by liberalization of the existing rules—indeed, I am not convinced that the potential for anticompetitive conduct is as slim as projected by the theoretical analysis herein—there is a substantial

[1] Since this proceeding began, much has been made about the extent to which the existing rules promote diversity in the program production market. My great concern about fostering diversity of broadcast ownership facilities is a matter of record and I am equally concerned about diversity in the program production market. However, based on the record before me, I do not believe a persuasive case has been made that these rules have promoted greater diversity in the program production market.

consensus that if such conduct does occur, the impact on the independent stations could be devastating and irreversible. Further public comment and analysis will provide a necessary extra measure of assurance that the rules we finally adopt will optimally serve their purpose.

My position on the sunset proposal is unequivocal and negative. If the Commission is committed to the continued well-being of the independents, and believes that oversight of the syndication process is necessary to assure that well-being, it is illogical to decide now based on nothing more than a "guesstimate" of future competition that such oversight will no longer be required at an arbitrary future date. The independents' lifeline should not be severed in this manner. As with any other agency rule, when the conditions that lead us to regulate in this proceeding no longer exist, the rules should then be revisited.[2]

In sum, there is considerable record evidence that the financial interest and syndication rules should be revised. However, we must be certain that the basis for a recrafted rule is well-founded and that the rules ultimately adopted will work smoothly and efficiently. I therefore await with keen interest the public's comment on this tentative decision and the draft rules so that we may responsibly conclude this proceeding.

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[2] As the Justice Department put its: "the growth of the new technologies is likely to reduce the need for a prophylactic rule at some point. [But] even the best projections can only approximate the effects of technological change on the programming marketplace [and on] the networks' position as gatekeepers in the market for syndicated programming." *See Reply Comments of the United States Department of Justice"* at 28.

Reconsideration, Petition for, Denial of Tariff, Cost Support Material

Petition for reconsideration of recent amendments to Section 61.38 of Rules, governing cost support material required to be filed with tariffs, denied. Petitioner offered no basis for assertions that information no longer required is needed for Commission review of tariffs, nor for its contention that notice and comment were required by Administrative Procedures Act. –*Amendment of Section 61.38*

FCC 83–399

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 61.38 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

(Adopted: September 9, 1983; Released: September 23, 1983)

BY THE COMMISSION:

1. Before the Commission is Satellite Business Systems' (SBS) petition for reconsideration of our Memorandum Opinion and Order (Order) amending Section 61.38 of the Commission's Rules, 91 FCC 2d 1074 (1982).[1] There, we concluded that changes in industry conditions and tariff filing practices since the adoption of Section 61.38 in 1970 warrant reduction of the cost support materials that dominant carriers are required to submit with their tariff filings. Specifically, we eliminated the requirement that such filings include a "backcast" estimating what the effects of proposed revisions on a carrier's traffic and revenues would have been if the revisions had been effective during a recent 12-month period of actual operations. We also reduced from three years to one year the required cost projections and traffic and revenue forecasts. These changes were adopted by the Commission on its own motion, without notice and comment,[2] because they relate to Commission practice and proce-

[1] We have also considered American Telephone and Telegraph's opposition and SBS' reply.

[2] To comply with the Regulatory Flexibility Act of 1980, 5 U.S.C. §601 et seq., the Commission published a notice in the Federal Register, 46 Fed. Reg. 56466 (1981), listing the Parts of its Rules to be reviewed over the next 12 months. This general

dure. SBS contends the amendments will compromise the Commission's ability, and that of interested persons, to evaluate the underlying cost justification for tariffed service offerings. It also asserts the Commission violated the rulemaking provisions of the Administrative Procedures Act (APA), 5 U.S.C. §553, because the amendments were not preceded by notice and comment. For the reasons set forth below, we deny the petition.

2. The imposition of the Section 61.38 support requirements in 1970, explained fully in our Order, was to provide a better base of information in tariff filings to assist Commission evaluation of such filings.[3] Our experience with tariff filings at the time had convinced us that requiring standardized cost support materials would save Commission staff time by minimizing the need for frequent supplemental information requests. Over a decade later, our more recent experience with tariff administration suggested the need to modify this rule. We determined that backcasts and extended forecasts were of questionable value in a rapidly changing telecommunications marketplace. Carriers are filing tariff revisions much more frequently as they respond to technological developments, changing customer demand, and competitive offerings. In these circumstances, Commission reliance on backcasts and extended forecasts as predictive aids to our evaluation of tariffs would not significantly inform the tarif review process and would burden carriers with unnecessary costs. Rather than continue to require the routine submission by all dominant carriers of these support materials, the cost of which is ultimately borne by ratepayers, we concluded that in most cases reduced submissions would still enable effective tariff review. We emphasized, however, that we could require more extensive support materials where particular circumstances suggested their usefulness.

3. Petitioner has not explained or supported its contention that Commission evaluation of tariff filings will be compromised by the revised standards. Petitioner does not suggest that the Commission's underlying characterization of the industry and of tariffing practices is mistaken, nor does it specify why the Commission will be unable to discharge its tariff review function. The rule, as revised, still requires the submission of economic data to support new or changed tariff offerings. As noted, we retain the discretion to require supplemental information as needed. Moreover, the formal complaint process remains available under Sections 206–209 of the Communications Act, to address allegations of unjust, unreasonable, or unreasonably discriminatory provisions in effective tariffs. In any

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notice of intent to review Part 61 occasioned specific comments suggesting and opposing possible changes in Section 61.38, but we do not reach the question whether that Notice constitutes sufficient notice for purposes of the Administrative Procedure Act, 5 U.S.C. §553.

[3] Tariffs-Evidence, 25 FCC 2d 957 (1970).

event, the requirements of Section 61.38 are not intended to charter independent tariff oversight by third parties. This section exists primarily to assist the Commission in exercising its discretion whether to suspend and investigate proposed tariffs, rather than to confer "important procedural benefits upon individuals." *Aeronautic Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 (D.C. Cir. 1980), *quoting American Farm Lines v Black Ball Freight Service*, 397 U.S. 532, 538 (1970). Thus, information supplied under Section 61.38 may be sufficient to aid the Commission in its exercise of discretion, without necessarily establishing the *prima facie* lawfulness of the proposed revisions. *Associated Press v. FCC*, 448 F.2d 1095, 1104 (D.C. Cir. 1971).

4. Petitioner has also failed to present any basis for reconsidering our determination in the Order that this rule is procedural and, therefore, exempt from the notice and comment requirements of the APA.[4] As just explained, Section 61.38 exists simply to provide the Commission a data base with which to evaluate tariff filings.[5]

5. Moreover, the forecast and backcast information eliminated from Section 61.38 was not being relied upon as a useful or practical tool in most instances of tariff review. In light of this practical experience, no purpose would have been served by soliciting public comment on whether such information is useful to the Commission in performing its tariff review functions.[6] To have employed a notice and comment proceeding under such circumstances would have created unnecessary delay, and further extended the burdens of furnishing materials not generally useful to nor utilized by the staff. Accordingly, the petition for reconsideration filed by Satellite Business Systems IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[4] In its reply, SBS asserts that paragraph 5 of the Order constitutes recognition that Section 61.38 is substantive in nature. However, the referenced passage states explicitly that the effective date provisions of the APA (§553(d)) are inapplicable because the action taken affects a procedural rule.

[5] "A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." Batterton v. Marshall, 648 F2d 694, 702–703, 707 (D.C. Cir. 1980).

[6] Petitioners' reliance on Pickus v United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974) is misplaced. That decision construed the APA exemption for procedural matters to exclude actions "likely to have considerable impact on ultimate agency decisions." In the present context however, the requirements for cost support material were moderated precisely because the more extensive materials are highly unlikely to have such an impact on the tariff review process. Further, Section 61.38 does not purport to establish actual standards for decision. *Pickus*, in contrast, involved formula-like standards used to calculate an inmate's remaining time in prison.

Common Carrier, Service, Resale and Shared Use of
Declaratory Ruling

Petition for declaratory ruling granted to an extent and otherwise denied. Resale or shared use restrictions may not be lawfully applied to physically intrastate WATS used in interstate communications. Commission declined to order BSOCs to offer service at particular rates or terms.
–AT&T Co.

FCC-83-40

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

American Telephone and Telegraph Company and the Bell System Operating Companies Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications

MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1983 Released: February 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

1. Before the Commission is a petition by Satellite Business Systems (SBS) asking us to declare that resale and sharing prohibitions in intrastate Wide Area Telecommunications Service (WATS) tariffs of the Bell System Operating Companies (BSOCs) have no lawful application to the use of "physically intrastate" WATS to complete interstate calls. SBS urges us, moreover, to order the BSOCs to provide "physically intrastate" WATS to it and other OCCs for use in interstate communication at the same rates as appear in the BSOCs' state tariffs for intrastate WATS to non-reselling customers.[1] For reasons indicated below, we are granting the

[1] The following have filed comments in support of the petition: the Western Union Telegraph Company; MCI Telecommunications Company; U.S. Telephone Communications, Inc.; Aeronautical Radio, Inc. (a private interstate carrier); and Lexitel Corporation, Combined Network, Communications Equipment Corporation, ATS Long Distance Network, Inc., Business Telephone Systems, Inc., LDX, Inc., and Telesphere Network, Inc. all certificated interstate resale carriers filing jointly as "Resellers". The American Telephone and Telegraph Company (AT&T) (on behalf of the BSOCs); the National Association of Regulatory Utility Commissioners

petition to the extent of ruling that resale or shared use restrictions may not be lawfully applied to "physically intrastate" WATS used in interstate communication. We decline at this time, however, to order the BSOCs to offer service at particular rates or terms.

The Petition

2. SBS contends that resale restrictions in intrastate WATS tariffs adversely affect the availability, cost, and quality of interstate services by preventing interstate carriers from using resold WATS to distribute interstate calls to points within the state where access to the WATS network is obtained. It then proceeds to explain how these restrictions ostensibly affect its own offering of switched voice services. Specifically, SBS asserts that it must resell telephone company services, including private line, ENFIA, and WATS, in order to compete successfully with AT&T because it is unable, for practical reasons, to extend its own facilities throughout the United States. It states that it generally terminates MTS/WATS - equivalent calls in local exchange areas in which its earth stations are located by means of ENFIA trunk connections obtained under BSOC Tariff F.C.C. No. 9. To terminate all calls via ENFIA connection, however, would assertedly require ENFIA access lines to each of the seventeen thousand local exchanges nationwide. This, SBS maintains, would be economically infeasible. Because it has not been able to obtain direct WATS connections between its earth stations and points within the same state, SBS asserts that it usually completes calls to points outside the exchange areas where its earth stations are located by routing to earth stations in other states in order to use interstate WATS, which is not subject to resale restrictions.[2] According to petitioner, the use of direct intrastate WATS connections would result in more efficient utilization of AT&T's public switched network facilities by eliminating unnecessary use of long haul interexchange circuits.

3. SBS next maintains that this Commission clearly has jurisdiction to rule as requested. In support of its contention in this regard SBS refers to Commission and judicial decisions which hold that even though a carrier's facilities may be located within a single state,

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(NARUC); the United Telephone System, Inc. (United); and the public utilities commissions of the states of California, Michigan, New York, Kansas, and Alabama have filed comments in opposition.

[2] For example, in order to complete calls from New York to Flagstaff, Arizona—where it has no earth station—SBS states that it first routes traffic to Los Angeles, the site of its closest earth station outside Arizona. The calls are then "backhauled" the 400 miles to Flagstaff via resold WATS obtained under the interstate WATS tariff (AT&T's Tariff F.C.C. No. 259). SBS maintains that this "backhauling" over an extended terrestrial link introduces unnecessary deterioration in transmission quality, most of which could be avoided if a WATS connection could be established directly from the Phoenix earth station, which is only 110 miles from Flagstaff.

when the facilities are used as an integral link in the transmission of communications by wire or radio between points in different states the service thus provided is jurisdictionally interstate.[3] SBS sees good cause for the Commission to assert its jurisdiction where, as here, the provisions in the BSOCs' intrastate WATS tariffs are said to operate in effect to restrict the resale and sharing of jurisdictionally interstate service. SBS emphasizes in this regard that the Commission has held that restrictions on the resale and sharing of interstate private line and public switched network services are unjust and unreasonable, in violation of Section 201(b) of the Communications Act[4] and unreasonably discriminatory, in violation of Section 202(a).[5] *Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T* v. *F.C.C.* 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *Resale and Shared Use of Domestic Public Switched Network Services*, 83 FCC 2d 167 (1980). These determinations, SBS notes, derive from the Commission's perception that a number of public and private benefits might ensue from resale and sharing of interstate services, among them the fostering of innovation and new technology, better network management, and a wider variety of services. The benefits which the Commission sought to bring about by requiring the elimination of interstate resale and sharing restrictions will remain partly unfulfilled, according to SBS, so long as local carriers can prevent the use of resold physically intrastate services for the distribution of interstate communications.

Summary of Comments

4. In opposition to the petition for declaratory ruling, United and the public utilities commissions of California, Michigan, Kansas, and Alabama argue that the Commission lacks jurisdiction to rule as SBS requests. They contend that "physically intrastate" WATS service, even when used in connection with other facilities to terminate interstate communications, is explicitly exempt from FCC regulation by operation of Section 2(b) of the Communications Act.[6]

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[3] United States v. Southwestern Cable Co., 392 U.S. 157, 168–9 (1968); Idaho Microwave v. F.C.C., 352 F.2d 729, 732 (D.C. Cir. 1965); Pacific Telephone and Telegraph Company, 88 FCC 2d 934 (1981); New York Telephone Company, 76 FCC 2d 349, 352, *aff'd sub nom.* New York Telephone Co. v. F.C.C., 631 F.2d 1059 (2d Cir. 1980); Telerent Leasing Corp., 45 FCC 2d 204, 219 (1974), *aff'd sub nom.* North Carolina Utilities Commission v. F.C.C., 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); and Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 FCC 2d 417, *aff'd sub nom.* Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974).

[4] 47 USC § 201(b).

[5] 47 USC § 202(a).

[6] 47 U.S.C. § 152(b). In pertinent part, Section 2(b) provides:

> [N]othing in this act shall be construed to apply or to give the Commission

5. NARUC and AT&T, on the other hand, do not dispute petitioner's contention that "physically intrastate" WATS service used in the manner described is subject to Commission jurisdiction. Instead, they contend that the Commission should decline to exercise jurisdiction at this time to avoid disrupting the orderly processes of state regulation. Since a number of states have already approved resale of intrastate WATS and many others have taken the issue under investigation NARUC asserts that it would be premature for the FCC to preempt state regulation in this area now. For its part, AT&T asserts that existing intrastate WATS rates are insufficiently usage-sensitive; in consequence, AT&T contends, to require resale of intrastate WATS under current rate structures would result in serious net contribution losses for intrastate services.[7] AT&T therefore urges the Commission to accord state authorities a reasonable time to review and implement revised intrastate WATS rates that would be compatible with full resale and shared use. To this end, AT&T asserts that restructured "tapered" WATS schedules have already been filed in twenty-five states, and that similar filings will be made in the remaining states by the end of the first quarter of 1983. AT&T asserts, moreover, that most of the BSOCs expect to file additional revisions to permit resale and sharing of intrastate WATS, once restructured rates have been implemented.[8] Thus, AT&T maintains, the issue which SBS is raising is moving toward resolution at the state level without the necessity for Commission intervention. Moreover, according to AT&T, other common carriers will not be prejudiced in the interim since there are several means by which the OCCs can presently complete interstate calls within any state: *e.g.*, ENFIA, ENFIA with intrastate MTS toll completion, dedicated connections to customer locations obtained under the BSOC OCC facilities tariffs, and interstate WATS.

6. As a separate matter, AT&T contends that even if the Commission declares the resale restrictions unlawful, it cannot prescribe the provision of physically intrastate WATS to reselling interstate carriers at existing intrastate rates, as SBS requests,

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jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

[7] AT&T does not explain why resale at current "non-usage sensitive" rates would allegedly lead to "serious net contribution losses." Presumably, its assertion to this effect is based on the assumption that if resale were permitted at the current relatively low rates, a substantial amount of arbitrage would occur, leading many customers to substitute resold intrastate WATS for other AT&T services.

[8] AT&T notes that resale and sharing of intrastate WATS is now permitted under recently - implemented state tariff revisions in Idaho, Ohio, and New York, and that resale and sharing is permitted on measured WATS in Iowa and South Dakota.

without first finding that the resulting state rates under resale would each be just and reasonable[9] Moreover, AT&T maintains that if "physically intrastate" WATS termination of interstate communications were required to be offered to resellers at the regular intrastate rates, it would become difficult if not impossible to enforce lawful resale restrictions on purely intrastate uses of WATS.

7. The remaining commenters express general agreement with SBS's contentions, but advocate a broader ruling. ARINC contends that the Commission should be concerned with the detrimental impact of these resale and shared use restrictions on private system operators as well as on carriers and accordingly asks us to declare the restrictions void as applied to physically intrastate WATS connected to any interstate communications system, whether of a common carrier or private entity. Further, the collective resellers urge us to declare all resale restrictions in state tariffs—not merely those pertaining to WATS—unlawful for all purposes inconsistent with the Commission's interstate resale objectives, and to preempt state certification requirements for resellers of intrastate facilities.

Discussion

8. It is by now well-established that communication service provided by means of wire or radio facilities located within a single state is subject to the jurisdiction of this Commission when serving as a link in an interstate channel of transmission established through interconnection. *See, e.g., U.S. v. Southwestern Cable Co., Telerent,* and *New York Telephone Company, supra.* Simply put, jurisdiction turns on the nature of the communications, rather than the location of the facilities links through which they pass. *Id.* In this case, it is undisputed that the intrastate WATS connections sought here would be used to terminate communications which originate in other states. Thus, the question confronting us is whether the BSOCs should be permitted to continue to invoke resale and sharing restrictions in their intrastate WATS tariffs where the effect is to bar resale and shared use of interstate communications.

9. This Commission recently issued a prescription concerning resale and shared use restrictions on the provision of interstate communications. *See* Report and Order in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network service,* Docket No. 80–54, 83 FCC 2d 167 (1980). There, we declared tariff provisions restricting resale and shared use of domestic public switched network services to be unjust, unreasonable, and unjustly discriminatory under Sections 201(b) and 202(a) of the Act. Moreover, we ordered all carriers subject to our

[9] As authority for this proposition, AT&T cites AT&T v. F.C.C., 449 F.2d 439, 450–1 (2d Cir. 1971); Nader v. F.C.C. 520 F.2d 182, 204 (D.C. Cir. 1975); and MCI Telecommunications Corp. v. F.C.C., 627 F. 2d 322, 337 (D.C. Cir. 1980).

jurisdiction to file revised tariffs eliminating all such restrictions from their domestic public switched network services. In the case of AT&T in particular, we ordered it to withdraw Section 2.2.1 of Tariff FCC No. 259 (WATS) and Section 2.2.1 of Tariff No. 263 (Message Telecommunications Service), and to file appropriate tariff revisions. 83 FCC 2d at 194.

10. In the course of our general discussion in the Report and Order in Docket No. 80–54, we did not explicitly consider the case of resale and sharing restrictions on intrastate WATS used to terminate interstate communications. Moreover, because these restrictions do not appear in tariffs on file with this Commission they were not technically subject to the filing directives of the Report and Order. Nonetheless, it was not our intention that resale and sharing restrictions would continue to be imposed on any form of domestic public switched network service used in interstate communication. Indeed, none of those commenting here argue that the stated grounds for our holding in Docket No. 80–54 are any less applicable in the case of resale and sharing restrictions on WATS used for intrastate termination of interstate calls than in regard to restrictions of this kind on other interstate public network services. So as to remove any doubt on this point, however, we now affirm that our policy encompasses resale and sharing restrictions on WATS used for the intrastate distribution of interstate communications, whether by a common carrier or a private entity.

11. This brings us, then, to the contention by AT&T and NARUC that we should in effect defer application of the policy we adopted in Docket No. 80–54 in these circumstances by permitting resale and sharing restrictions to continue to be imposed on intrastate WATS termination of interstate calls until the BSOCs have implemented restructured intrastate WATS rates. It is important to bear in mind here that in Docket 80–54 we concluded that extensive public benefits could reasonably be anticipated from resale and sharing of public switched network services, without significant adverse consequences. 83 FCC 2d at 193. We also concluded that our policy favoring unlimited resale and sharing of such services should be implemented swiftly after a short adjustment period. To defer ruling here pending implementation of restructured intrastate WATS rates pursuant to diverse state proceedings would entail an indeterminate delay in full realization of the benefits which we anticipated from the resale and sharing of interstate services, and hence would be contrary to the public interest. While AT&T suggests that alternative means are presently available to the OCCs for completing interstate calls, it has not controverted the petitioner's contention that within-state WATS terminations are superior from the standpoint of efficiency and economy. No convincing showing has been made, on the other hand, that the resale and sharing of WATS used in this way would harm the network as a whole. Although AT&T and

NARUC assert in this regard that eliminating these restrictions on WATS used to terminate interstate calls would render it difficult to prevent resale and sharing of jurisdictionally intrastate WATS at the current non-usage-sensitive rates, in consequence of which intrastate revenues would diminish drastically, they fail to adequately state and support their reasons for supposing that this would prove to be the case.[10] These assertions do not warrant a delay in implementation of our important federal policy determination that unrestricted resale and sharing of interstate services would serve the public interest objectives which this Commission is mandated by statute to foster. *See North Carolina Utilities Commission v. F.C.C., supra.* In any event, if it does develop that resale and sharing of interstate services occurring as the result of our policy initiatives have incidental consequences of concern to those charged with regulating jurisdictionally intrastate services, we have no reason to suppose that state commissions would be unable to take prompt curative action.

12. Since SBS' proposed use of physically intrastate WATS is jurisdictionally interstate, we would under normal circumstances expect FCC tariff provisions to be filed for this service. In this way we would ensure that the interstate character of this WATS usage is recognized by the separations process (47 CFR Part 67) and that interstate costs are fully recovered by the rates which customers pay. On the other hand, it would likely be some months before FCC tariff revisions could be expected to take effect, in view of the time required for tariff preparation, public comment, staff review, and possible suspension. This course would delay the implementation of our resale policy and deprive SBS of this service for an even longer period. Furthermore, the Modified Final Judgment and our recent prescription of an access charge plan in Docket No. 78–72 require that any such tariff would soon after have to be reformed to reflect the new method of compensating local telephone companies for exchange access. In any case, because of the Joint Board's decision to freeze the Subscriber Plant Factor at 1981 levels for all factors in the formula[11] it is of little consequence how this usage of physically intrastate WATS is treated for separations purposes.

13. Accordingly, IT IS ORDERED, That the petition for declaratory ruling filed by Satellite Business Systems filed on June 7, 1982 IS GRANTED to the extent indicated, and is otherwise DENIED.[12]

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[10] We emphasize in this regard that our ruling here does not extend to restrictions which pertain solely to the provision of WATS used in intrastate communication. The request by the collective resellers that we preempt state regulation to the extent of outlawing resale restrictions on purely intrastate services and abrogating state certification requirements will be denied, as it is beyond the scope of the matters on which comment was sought.

[11] See, In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Docket No. 80–286, 89 FCC 2d 1 (1982).

14. IT IS FURTHER ORDERED, That this order will take effect thirty days from the release date.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[12] We decline to grant relief to the extent of ordering the BSOCs to provide "physically intrastate" WATS to OCCs and resellers at the currently effective intrastate rates, no justification having been shown here for departing from the procedure normally contemplated under Title II of leaving it to providing carriers to develop rates in the first instance.

Common Carrier, Cost Accounting Methodology
Common Carrier, Cost Justification
Common Carrier, Costs, Allocation of
Common Carrier, Interstate
Costs, Allocation of

This item revises the Interim Cost Allocation Manual used by AT&T to allocate costs among its interstate services.
–AT&T Co.
CC Docket No. 79–245

FCC 83–374

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE AND TELEGRAPH Co.	
Manual and Procedures for the Allocation of Costs	CC Docket No. 79–245

ORDER

(Adopted: August 4, 1983; Released: August 22, 1983)

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

I. Introduction

1. On May 18, 1983, the Commission released a Notice of Proposed Rulemaking in this proceeding. 48 F.R. 23854 (May 27, 1983). That Notice contained our proposals to modify the *Interim Cost Allocation Manual* (*ICAM*) for AT&T's interstate services so that the *ICAM* would reflect changes brought about by our Access Charge Order[1] and the divestiture of the Bell Operating Companies.[2] This proceeding is intended to make changes to the *ICAM* necessitated by those events. As we stated in the Notice, there are other issues pending in this docket which are not addressed here. Our intention is to reach those issues later. This Order makes adjust-

[1] MTS/WATS Market Structure Inquiry, Third Report and Order 48 F.R. 10319 (March 11, 1983).

[2] Modification of Final Judgment (MFJ), United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982) aff'd sub nom. Maryland v. United States, 51 U.S.L.W. (March 1, 1983).

ments to the *Manual* to enable the American Telephone & Telegraph Co. (AT&T) to file new interstate tariffs in October 1983, to be effective at divestiture proposed for January 1, 1984.

II. Summary of the Comments

2. Comments and replies were received from seven parties. AT&T agreed for the most part with the changes in the *ICAM* described in the *Notice*. It observed, however, that it does not believe that *ICAM* is an appropriate long-term regulatory tool. AT&T further stated that even for the October 3, 1983 filing the Commission may have to consider not holding AT&T to the strict equalized rate of return requirements associated with the *ICAM*. These "equalization" requirements require AT&T to attempt to earn the same rate of return from MTS, WATS and private lines. The Commission may have to consider a "permissable zone of reasonableness" for the rates of return of the individual services because changes in the *ICAM* and changes resulting from the divestiture may affect the allocations of cost in unexpected ways.

3. AT&T states that with one major exception (premium access) it has chosen the same allocation methodology for its October 3, 1983 filings as that proposed in the Notice. Further, because of time constraints, if the *ICAM* amendments finally adopted differ substantially from AT&T's assumptions, it will have to take account of such changes in early 1984.

4. AT&T has argued against the premium access charge in *Access Reconsideration*. Regarding the allocation of the premium access charge, AT&T states that there is "no method that is not arbitrary for allocating an expense which is itself determined in an uneconomic manner." AT&T Comments, p. 6. The use of conversation minutes proposed in the *Notice* as an allocator for the premium access element will cause major shifts in the allocation of costs between MTS and WATS thus compounding the premium access problem as viewed by AT&T. If the requirement to equalize the rates of return of MTS and WATS is enforced by the Commission, the major shift in cost allocation would give improper and transitory price signals. To avoid such an abrupt shift in the cost allocation, AT&T recommends the use of the relative number of MTS and WATS messages as a basis of allocation. AT&T says that the use of messages would give the desired result by not changing significantly the relative allocation of costs to these services, ameliorating customer impact related to the premium access expense. The use of minutes would cause a "temporary but dramatic shift in cost assignments and rates, if an inflexible equialization requirement is imposed." AT&T Comments, p. 8. AT&T further argues that, to the extent that there are differences in access provided to it and the OCCs, these differences deal with call "setup," not a call's duration,

thus arguing for the use of messages as an allocator rather than minutes.

5. AT&T asserts that the Exchange Contract Services Category proposed in the Notice is not appropriate to the *ICAM*. The revenues and costs of the services and facilities provided to the divested Bell Operating Companies will not be part of AT&T interstate common carrier operations and thus will not be part of the interstate rate base or cost of service. These revenues and costs will be identified on its books of account, AT&T declares, and the FCC may monitor those amounts through means other than the *ICAM*.

6. AT&T then presents arguments supporting its position that *ICAM* "will serve no useful purpose in 1984 and beyond." AT&T Comments, p. 11. AT&T cites what it calls "pervasive competition" and low entry barriers to bolster its arguments.

7. GTE Sprint Communications Corporation, formerly Southern Pacific Communications Corporation, points to a "lack of clarity in a number of access expense allocation procedures [which] will inevitably lead to an overallocation of costs to the MTS category and an under allocation of costs to the WATS category." In particular GTE Sprint points to the lack of a reason for using only the open-end minutes of WATS in the allocation of the premium access charge. GTE Sprint contends that MTS will be burdened with greater expenses while the WATS rate base would be artificially decreased, thus eventually increasing the rate differential between the two services. This would be "inimical to promotion of full and fair competition." GTE Sprint Comments, p. 6. GTE Sprint recommends that the Commission either count both the open and closed ends of WATS lines or allocate the premium access amount based on the number of MTS and WATS calls.

8. GTE Sprint also argues that the allocation of common and dedicated transport expenses do not account for the distance factor discussed in the *Third Report and Order* in CC Docket No. 78–72 (Access Charge decision). GTE Sprint Comments, p. 8. It also asserts that the allocation of billing and collection costs is not specific enough. GTE Sprint believes that the "obscure language" will allow AT&T "to interpret the allocation procedures in a variety of ways which subsequently would allow it to vary the share of expenses allocated among the three service categories." GTE Sprint Comments, p. 9. In addition, GTE Sprint claims that the allocation procedure for transitional surcharges is more general than it should be and the difference in detail between their descriptions in the *Notice* in this proceeding and the *Third Report and Order* could lead to inconsistent allocations. "The Commission should consider allocating directly according to the percentages of credit card, collect calls and 800 Service to AT&T's respective service categories," argues GTE Sprint. Comments, p. 11.

9. United States Transmission Systems, Inc. (USTS) argues that

this proceeding is misconceived, noting that it may prejudice outstanding issues in the Access Charge proceeding. Further, if changes need to be made in the *ICAM* because of reconsideration of access charges, another Notice would be needed here. This is a procedure the Commission said it will not follow, declares USTS. The interim procedures are flawed and amending them to aid divestiture is uncalled for, says USTS. USTS argues that AT&T can file new tariffs effectuating divestiture without changing the *ICAM*. USTS asserts that the Commission should apply accounting and costing procedures to the BOCs. USTS characterizes the FCC's proposal as "treacherous" and urges that the Notice be dropped.

10. ABC, CBC and NBC (the Networks) note that the program transmission facilities provided to them by AT&T are treated separately in the access charge plan and point out that they have asked that a separate category for those costs be created in the access rules "to eliminate the possibility of confusion" concerning the Commission's intent. Networks' Comments, p. 4. The *ICAM* should conform to the Commission's intent in the *Third Report and Order* and the Commission should "ensure that only the costs which are actually attributable directly to program transmission are allocated to these services." Networks' Comments, p. 7, footnote omitted.

11. Satellite Business Systems (SBS) "strongly urges the Commission to provide for continued reporting by the divested BOCs as to their interstate access-related investments, expenses and revenues." SBS Comments, p. 1. It urges the Commission to promptly issue a Notice in this matter.

12. SBS argues for the collection of data on time-of-day (peak/off-peak) network utilization to support and evaluate the FCC's network efficiency-related decisions. Expenses, investments, revenues and rates of return should be calculated by the time of day in any permanent cost manual and in the *ICAM* if possible.

13. SBS argues that AT&T will end up paying a premium access charge that is actually far less than the nominal $1.4 billion amount stated in the Access Charge Order. SBS suggests that AT&T report, parenthetically, the actual amount of a premium charge it is paying over what it would otherwise pay. Also, the FCC should not anticipate Joint Board action as it does in the *Notice*, says SBS. Only actual, not planned separations, changes should be dealt with. Finally, SBS argues that more detailed rules should be promulgated for Exchange Contract Services.

14. The Ad Hoc Telecommunications Users Committee (Committee) generally agrees with the changes proposed with three major exceptions. First, the FCC should include any material changes from the access charge reconsideration in the *ICAM* and not accept the *Third Report and Order* as "given" as the Committee interprets the *Notice*. Second, the *ICAM* language should be more precise concerning Local Switching, Dedicated Transport and Special Access. Third,

"General Services and Licenses" cost procedures should not be changed as they were in the *Notice*.

15. The Committee suggests that the revised *ICAM* should specify that LS-1 switching "should be allocated among all *ICAM* services that utilize such switching in proportion to the relative incidence of line termination costs among those same services." The Committee also believes that the *ICAM* should recognize that an open-end private line service may someday be offered over a higher feature trunk-side type switching arrangement. This would require the reallocation of some LS-2 costs, the Committee asserts. Finally, the Committee argues that the "General Services and Licenses" changes sacrifice detail, and suggests that they should be retained at least as they are now. In fact, the Committee declares the *ICAM* should be amended to require AT&T "to allocate such costs to the service categories and specific service offerings on the same cost causative basis and level of disaggregation as exist in AT&T's internal cost allocation systems." Committee Comments, p. 17.

16. In its Reply, the Committee writes that it agrees with the allocation of the premium access charge based on messages rather than minutes. The Committee remarks that while it "firmly is of the view that NTS costs are best recovered through flat rate charges, premium access does relate more directly to the costs of establishing an individual message than to the duration of the message." Committee Reply, p. 2. The Committee also observes that AT&T's "facts" concerning the "competitiveness" of the interexchange transmission services market are not undisputed at this time. The Committee opines that the Commission needs to continue to rely on the *ICAM* and other aspects of tariff regulation of AT&T well into any transition period toward freer pricing.

17. MCI Telecommunications Corporation (MCI) points out that no matter what the Commission adopts, "apparently AT&T will ignore any Commission action resulting from this proceeding." Reply, p. 2. The FCC "must resist AT&T's attempt to steamroll it into actions that clearly benefit AT&T and AT&T alone . . . [N]o new policies should be adopted in this docket at this time." MCI Reply, p. 3. The FCC did not adopt an allocation procedure for premium access in the Access Charge Order. MCI argues that adopting one here would be proposing a new policy despite the FCC's statement in the *Notice* that no new policies are being adopted here. MCI urges the FCC to first decide the size and components of the premium access charge on reconsideration in CC Docket No. 78–72 and thereafter seek public comment on the method of its allocation between MTS and WATS.

18. MCI wants the FCC to scrutinize AT&T's earnings ratios to minimize cross-subsidies despite AT&T's arguments that uncertainty over the outcome of the cost allocation process should cause the FCC to use a "permissable zone of reasonableness." Not only should

the FCC strictly enforce the *ICAM* requirements now but MCI suggests that the FCC develop a cost manual for exchange communication in the future. Finally, MCI argues against institution of any proceeding looking toward deregulation of AT&T's basic transmission services.

19. In its reply, GTE Sprint objects to the AT&T proposal for continued use of message minute miles to allocate Interexchange Central Office Equipment. GTE Sprint believes that the number of circuits dedicated to MTS and WATS at the peak period should be used as a means of allocation. It also argues for a separate cost allocation manual for the Bell Operating Companies (BOCs), and claims that AT&T's market power in the interexchange industry makes a cost allocation manual necessary for the future.

20. AT&T, in its reply, begins by noting the similarity between its position and that of GTE Sprint concerning allocation of the premium access charge. It disagrees with GTE Sprint's proposal to include a distance factor in the allocation of common and dedicated transport expenses. AT&T argues that this is an unnecessary complication and the bills rendered to AT&T will not identify common or dedicated access by reporting category. AT&T could do this after the fact, but it would be complex. Besides, these costs will be "only about four percent of total reporting category costs in 1984" according to AT&T.

21. AT&T interprets the *ICAM* provision for billing and collection services costs to mean that these expenses should be directly assigned to the categories identified for AT&T by the exchange carriers (i.e., MTS, WATS, or private line). AT&T believes this answers GTE Sprint's objection concerning that access expense element. As for transitional surcharges, AT&T claims that it interprets the proposed *ICAM* language consistently with GTE Sprint's suggestion.

22. As for the Networks, AT&T alleges that they want a new reporting category for program transmission services. AT&T declares that the FCC rejected this approach before and that the questions raised by the Networks are better addressed in individual tariff filings and not the *ICAM*.

23. AT&T's reply says the SBS suggestion concerning time-of-day reporting should be rejected because it would contribute nothing to *ICAM's* purpose as a regulatory tool. AT&T dismisses SBS's suggestion concerning the parenthetical reporting of "actual" premium access expenses, noting that the *ICAM* deals only with actual amounts paid.

24. AT&T agrees with the Committee's recommendations dealing with LS-1 and LS-2 access facilities. On the other hand, AT&T faults the Committee's proposal to disaggregate dedicated Transport to distinguish between interface and conditioning costs that may apply differentially to MTS and WATS. This is inappropriate, AT&T

asserts, because dedicated Transport facilities will be shared by MTS and WATS and no interface or conditioning costs in the dedicated Transport element will be associated only with MTS or WATS. AT&T also argues that the Committee's suggestion to segregate private line special access by individual types of private lines should be rejected because disaggregation below the broad private line category is inconsistent with the intent and structure of the *ICAM*.

25. With respect to the Committee's arguments regarding General Services and Licenses, AT&T observes that it will "disaggregate these amounts into categories based on directly incurred expenses and investments in a manner similar to the current procedure." AT&T Reply, p. 13. AT&T asserts, though, that it is premature to propose a detailed list of new categories which reflect the divestiture. AT&T believes that the proposed language gives it the flexibility to handle this problem, writes AT&T.

DISCUSSION

I. *Investments and Reserves*

General Instructions

26. In the Notice, we deleted references to the BOCs to reflect the divestiture of these entities from AT&T. This prompted several questions in the comments. The main issue was the applicability of the *ICAM* to the divested companies. See the Comments of SBS, for example. MCI also raised the possibility of a future exchange company cost allocation manual.

27. This proceeding is designed for the sole purpose of modifying the *ICAM* for use by the AT&T interexchange entity. While we recognize that the BOCs will also offer some interstate service, we are not prepared now to promulgate a manual for their interstate services. Persons who believe that such a manual would be desirable may file a petition for rulemaking. Our immediate need is to prepare for the October 1983 tariff filings of AT&T which will reflect the divestiture and the institution of interstate access charges.[3]

Reporting Categories

28. AT&T argues against the new category for "Exchange Contract Services to Divested Companies" which we proposed in the *Notice*. AT&T claims that none of the costs will be in the interstate rate base and that the revenues and costs associated with these will be accounted for separately, thus meeting the FCC's information needs for monitoring these relationships. See comment summaries above.

29. It appears likely that most AT&T revenues from such

[3] MCI stated that an exchange manual should be developed at some time next year. We will handle that question if and when MCI files a petition seeking such action.

contract services relating to regulated operations will be intrastate revenues. If this is the case, we do not need a separate reporting category in the *ICAM* for exchange contract services. The separate accounting for these services by AT&T will allow for our review of these agreements as we now understand them. We note that our staff is now examining these sharing arrangements in connection with the divestiture-related Section 214 proceeding.[4] We will not require AT&T to report these as a separate *ICAM* category at this time. If we determine after further investigation of the post-divestiture arrangements that separate reporting is required, we will act to change the *ICAM*.

30. GTE Sprint and AT&T have both commented on the proposed change in the allocation of interexchange COE circuit equipment. We proposed that this investment would be allocated on the basis of the allocation of interexchange circuits rather than message minute-miles. GTE Sprint supports the change with the understanding that the relative number of circuits assigned to each service would be determined at the peak. AT&T claims that the change could not be implemented because there is no way to differentiate between MTS and WATS interexchange circuits.

31. The proposed change in the allocation of the interexchange COE circuit equipment has certain appeal from the standpoint that circuit equipment costs should be related to (and allocated according to) the assignment of those circuits to specific uses to provide certain services. For the purposes of this proceeding, we will accept AT&T's statement that there is no method to differentiate between the MTS and WATS circuits. However, further changes in the *ICAM* may be necessary in the future. We reserve the right to revisit this issue and pursue the use of surrogate measures at that time.

32. References to the allocation of certain BOC switchboard investment were deleted in the *Notice* with the idea that AT&T would not do its own billing. AT&T observes that some switchboards will be transferred from the BOCs to AT&T whether AT&T does its own billing or not. We agree that the wording should be restored to account for the transferred switchboards which were originally covered under that wording in the *ICAM*. AT&T also notes that the deletion of references to the BOCs left only references to Long Lines in this section of the *ICAM*. This wording change apparently will exclude certain interstate costs which will reside in the AT&T interexchange companies (IXCs). These IXCs, according to AT&T, "will be formed to receive the BOC interLATA services." Besides omitting certain costs, the deletion of specific BOC or Long Line references also misallocates certain investments. For example, deleting the reference to Long Lines message switchboard invest-

[4] See the letter from the Chief of the Common Carrier Bureau to Alfred Green of AT&T dated July 8, 1983, p.3.

ment, which is used to provide overseas MTS, inadvertently would have the effect of allocating all interstate message switchboard investment to MTS, even that used for WATS. This was certainly not the effect we wanted to achieve. We will adopt the specific language changes proposed by AT&T to remedy this oversight.

II. *Allocation of Access Expenses*

33. Since we issued the *Notice* in this proceeding, we have reconsidered the access charge decision set out in the *Third Report and Order* in CC Docket 78–72. While many changes were made on reconsideration, certain ones are especially relevant to this revision of the *ICAM*. First, we have changed the nature of the premium access charge. Our original proposal would have levied a $1.4 billion premium on AT&T. In *Access Reconsideration*, we have determined that the premium access amount will be implemented on the basis of a per minute differential in Carrier Common Line charges between AT&T[5] and Other Common Carriers. By accounting for premium access in this way, there is no longer a discrete premium amount which must be allocated among AT&T's services. Therefore, no further action is required for purposes of the *ICAM* except to delete the premium access charge as a separate expense category. All Carrier Common Line expenses will be allocated to AT&T services on the basis of relative access minutes.[6] We are also eliminating the assignment of the Operator Assistance charges because that rate element has been eliminated in the *Reconsideration Order*.[7] The *Access Reconsideration Order* also creates a category called "Coinless Pay Phones" for which a rule of allocation has to be developed. We understand that these phones are used almost exclusively for MTS calls. For the purposes of the October filing, we will have AT&T allocate this access expense exclusively to MTS because of the nature of the use of these coinless pay phones.

34. It will also be necessary to apportion the Special Access surcharges, which have been created by the Access Reconsideration

[5] The differential applies to users of certain services. For the purpose of the *ICAM*, we are concerned with the differential that applies to AT&T's services.

[6] In Access Reconsideration, we have defined "access minutes of use" as the usage attributable to interexchange carriers for the purpose of calculating chargeable usage. In connection with the originator of an interstate foreign call, usage is to be charged from the time the originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier's facilities in the originating exchange area. In connection with the terminator of an interstate or foreign call, usage is to be charged from the time the call is received by the end user in the terminating exchange. Timing of usage at both the originating or terminating end of an interstate or foreign shall terminate when the calling or called party disconnects, whichever event is first recognized in the originating and terminating end exchanges.

[7] The merger of the Dedicated Access Line and Special Access elements does not require any change in the apportionment of AT&T Special Access expense.

Order, between the Private Line and WATS categories. This does not present a difficult problem because such surcharges will be assessed to a private line or a WATS access line and can be directly assigned to those categories.

35. Now we turn to specific suggestions made by the parties concerning various aspects of access expense allocation. The Networks have proposed that we create a new access category for program transmission in the access reconsideration. We did not create such a category on reconsideration. Alternatively, the Networks asked that we create a new *ICAM* category for program transmission if no separate access category is established. We reject this request. The *ICAM* is intended to reflect broad service categories. Any subdivision of the private line category such as that proposed by the Networks can be considered when we conduct further proceedings to determine whether a different Manual would be appropriate for the long run. This is not the proceeding in which to make such a determination.

36. GTE Sprint argues that the proposed allocation of common and dedicated transport expenses does not conform with the access charge scheme because the proposed *ICAM* rule does not account for the distance weighting used in the development of the transport charges. While GTE Sprint's point is well taken, we must point out that it is unlikely that bills from local exchange carriers will specify this distance information. While the exchange carriers will use such information in developing their tariffed access charges, we have no requirement that they identify the transport billings by *ICAM* categories. We did not institute such a requirement because the exchange carriers cannot identify the service nature of the traffic being carried over what are truly "common" lines. However, if an appropriate, easier method can be suggested for the allocation of this expense, we will consider such a change for the future.

37. The GTE Sprint objection to what it characterizes as the "obscure language" directing the allocation of the "billing and collection" element is unfounded. If exchange carriers perform billing for MTS and WATS or MTS, WATS and private line, we understand that access charges for each will be separately stated where possible. Therefore, such expenses can be directly assigned to each category.[8] The cause of confusion here or any suggested method of correcting it is not immediately apparent from the GTE Sprint presentation.

38. GTE Sprint also requests that the transitional surcharge allocation be made more specific and directly allocated according to the percentages of credit card, collect calls and 800 Service to AT&T's respective service categories. The Access Reconsideration

[8] In the event that the access charges are not separately stated, they will be allocated as expressly stated in the *ICAM*.

Order eliminates those surcharges and therefore GTE Sprint's arguments on this point are moot.

39. The Committee made a recommendation for changes to the local switching 1 (LS-1) and local switching 2 (LS-2) elements. It observes that, unlike the current situation, future "MTS" offerings might use line side connections and future "private line" offerings might use trunk side connections. Such offerings would require changes in the proposed methods of allocation. LS-1 for example is allocated only to private line today because the only A&T service using them is private line. Such contingencies conceivably might warrant changes in access charge classifications at some point in the future, but these suggested changes would not be consistent with the access charge rules as modified in the Reconsideration Order. Therefore, we are not adopting those suggestions.

40. The Committee's suggestions for (1) disaggregating the Dedicated Transport element, (2) segregating Special Access WATS and private line and (3) segregating the Special Access Costs of individual types of private line are inappropriate here. The first two recommendations are topics for consideration in the formulation of access categories, not the allocation of already aggregated expenses. The third suggestion is appropriate for the tariff process. These revisions to the *ICAM* are concerned with the broad, existing categories. Future disaggregation may be desirable, but for now we leave this to future proceedings.

41. AT&T also notes that the definition of minutes of use in footnote 2 on page 3 of the Manual should only apply to carrier common line; that is, the computation of minutes of use which counts only open-end WATS. We are deleting that footnote because changes in the access charge rules adopted in the Reconsideration Order provide the necessary clarification.

42. AT&T further says that Dedicated Transport can apply to private line as well as MTS and WATS. That statement is incorrect. Private line facilities that perform a parallel function are classified as Special Access under the access charge rules. Therefore, we reject the proposed revision.

43. While the nature of the premium access charge has changed, we recognize that there is still concern over the ultimate relative allocation of MTS and WATS costs. The *ICAM* methodology has yet to be tested in the divestiture and access environment. It is conceivable that the procedures that were adequate during relatively stable periods may not easily adapt to the new industry structure and associated changes in the way interstate costs are incurred. Consequently, until we are provided with concrete information about the effects this methodology has on service category costs, and particularly on rates, we shall keep an open mind about the suitability of these procedures and, more generally, the future of *ICAM* as a regulatory tool. For purposes of its October tariff filings,

should AT&T find that application of the Manual will cause unacceptable delay in preparing tariffs, or produce distorted results or undesirable rate impacts as it learns more about the cost shifts associated with divestiture and access charges, it may wish to seek a waiver of the Manual or the earnings equalization requirement. Of course, other parties are not precluded from petitioning this Commission to voice their concerns.

III *Expenses Not Related to Access and Income - Description of FDC Methodologies*

44. In the Notice, we deleted many portions of this final section of the *ICAM* which in our view at that time would not apply to AT&T after divestiture. There are some which should not have been deleted, and at AT&T's suggestion we are restoring them. The major deletion of the methods for allocation General Services and Licenses was criticized by the Committee. We proposed to delete dozens of very specific allocation rules and replace them with a general instruction which would have indirectly allocated these expenses to the categories in the same way as directly incurred expenses. We did not mean to reduce the specificity of the allocations, only to give AT&T the opportunity to provide such a listing which reflects those activities which are actually undertaken at the time it files rates and in the June reports. We agree with the Committee that such detail is important. We will retain the language proposed in the *Notice* in view of AT&T's statement in its replies that "Any annual FDC reports filed by AT&T allocating GS&L expenses will disaggregate those amounts into categories based on directly incurred expenses and investments in a manner similar to the current procedure." If AT&T's filings do not contain sufficient detail, we can amend the *ICAM* at a later date to require more detail.

Other Matters

45. There are some suggestions made in the comments which we have not addressed yet. SBS recommended that time-of-day data be developed in the *ICAM*. This suggestion is inappropriate to our limited purposes of updating the *ICAM* to reflect access charges and the divestiture. For this reason, we reject the suggestion. SBS also stated that we should not anticipate Joint Board actions in this item. MCI also said that changes to the *ICAM* are premature until the premium access question is settled. The changes which we are making in the Manual will make it consistent with access charges and the AT&T divestiture. We believe these changes are appropriate and necessary to permit timely filing of access charges. As a final matter, AT&T has argued for an end to *ICAM* after 1984 and also begins making a case for deregulation. Whether such arguments are valid or not, they do not fit into the narrow focus of this proceeding and, therefore, merit no further discussion.

46. Accordingly, IT IS HEREBY ORDERED, pursuant to 47 U.S.C. §§154(i), 154(j) and 201–205, That the AT&T Cost Allocation Manual IS AMENDED as noted above and in the attachment to this *Order*.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Cost Allocation Manual

This manual contains general instructions for allocating the annual interstate investment and expense costs less any amounts for exchange contract services to divested companies to the following reporting categories for AT&T.

Private Line
Message Telecommunications Service (MTS)
Outward WATS and 800 Service (collectively, WATS)

For each of the reporting categories, an earnings ratio will be developed according to this formula:

$$\text{Earnings Ratio} = \frac{\text{Revenues minus (expenses and taxes)}}{\text{Gross investment minus reserves}}$$

These earnings ratios, plus supporting documents, will be filed with the Commission during June following the reporting year ("central submission"). These earnings ratios will be subject to final interpretation by the Commission.

The process for making changes to this manual shall be determined by the Chief, Common Carrier Bureau. Minor changes (such as changes in account names) may be made providing these changes are approved by the Chief, Common Carrier Bureau prior to filing of the central submission. Substantive changes, which may be requested by any party, will require appropriate procedures.

I. *Investments and Reserves*

Instructions in this section are to be used to allocate interstate investments and reserves to the reporting categories.

A. *General Instructions*

Using Jurisdictional Separations Process (JSP) data, principles and AT&T accounting records, investment and reserves for the company and any wholly owned carrier subsidiaries will be divided between private line and message categories. Message investments will be grouped into interexchange and "other" categories to be used in further allocation to MTS and WATS. Those portions of investment associated with the switching function will be allocated separately as described below.

B. Reporting Categories

Private Line

This category contains investments and reserves associated with private line services.

MTS and WATS

Investment and reserve amounts for the message category, as developed above, will be allocated to MTS and WATS. Message telephone plant (defined here as Account 100.1 less private line investment, land, buildings, furniture and office equipment, and vehicles and other work equipment) will be identified. Interexchange Toll Dial Switching and Switchboard investment will also be separately identified. Interexchange outside plant and COE amounts will be allocated between MTS and WATS based on network message minute miles. Toll Dial Switching investment will allocated on the basis of switched message minutes. The determination of investment in the various switchboard types will be based on JSP data. Investment in overseas/international message switchboards will be directly assigned to the MTS reporting category. Investment in switchboards used to provide 800 Service information will be assigned to the WATS category. Investment in other switchboards will be identified as serving billed or non-billed messages, using traffic unit data. Investment serving billed messages will be allocated between MTS and WATS based on the relative number of MTS and WATS messages served by such investment. Investment serving non-billed messages will be allocated based on the relative number of total MTS and Outward WATS messages. International satellite associated earth station investment (Account 100.5) and its associated depreciation and amortization account (Account 175) will be allocated on the basis of international satellite rents.

Interexchange, international satellite and switching telephone plant developed separately for MTS and WATS will be added together to form total message telephone plant amounts for MTS and WATS. The percentage which MTS and WATS telephone plant each makes of total message plant (as defined above) will be used as a distributive ratio to allocate all remaining investment ("other") and reserve accounts between MTS and WATS.[1]

II. *Allocation of Access Expenses*

Procedures in this section are used to allocate the expenses

[1] Included in these remaining investment and reserves portions are the following accounts: Land and Buildings; Furniture and Office Equipment; Vehicles and Other Work Equipment; Telephone Plant Under Construction; Property Held For Future Telephone Use; Materials and Supplies; Customer Deposits; Organization, Franchise and Patent Rights; Depreciation Reserve and Accumulated Deferred Income Tax Reserve; Amortization Reserve; and Cash Working Capital.

associated with payments to local exchange carriers for access to their local facilities. The allocation of all other expense accounts is contained in Section III, below. "Private line" use referred to in categories allocated directly or indirectly among MTS, WATS and private line on a message or minute basis means FX, CCSA, SCAN and CCSA equivalent Open End traffic.

Access Expense	*Allocation Procedures*
Carrier Common Line Usage	Apportion among MTS, WATS and Private Line on the basis of the relative access minutes attributed to each category for purposes of such access charge billings.
Line Termination	Apportion among MTS, WATS and Private Line on the basis of the relative access minutes attributed to each category for purposes of such access charge billings.
Local Switching 1	Assign to the Private Line category.
Local Switching 2	Apportion between MTS and WATS in the same proportions as Line Termination charges apportioned to such categories.
Intercept	Apportion among MTS, WATS and Private Line in the same proportions as Line Termination charges apportioned to such categories.
Information	Assign to MTS and WATS on the basis of the relative proportion of total MTS and OUTWATS calls.
Common Transport	Apportion among MTS, WATS and Private Line on the basis of the relative access minutes attributed to each such category for purposes of such access charge billings.
Dedicated Transport	Apportion between MTS and WATS in the same proportions as Line Termination charges apportioned to such categories.
Special Access	Apportion between WATS and Private Line in the same proportions as such access charge billings attributed to each category.
Billing and Collection	Apportion among MTS, WATS and Private Line in proportion to access charge billings attributed to each category.
Coinless Pay Phone	Assign to MTS.
Special Access Surcharge	Assign to WATS or private line on the basis of lines assessed.

III. *Expenses Not Related to Access and Income—Description of FDC Medhodologies*

Procedures in this section are to be used to distribute all interstate expenses not related to access expenses (600 series accounts) and income to the reporting categories. Expenses are directly assigned where applicable or allocated on the basis of the procedures described below. Certain accounts are allocated on the basis of "total attributable expenses." This factor represents each reporting category's percentage share of expenses derived through direct assignment and allocation procedures (except local, state and federal income taxes).

Expenses and Revenues–FDC Methods

Operating Expense Accounts	*Allocation Procedures*
602.1–602.8 Repairs of Outside Plant (OSP)	Allocate to reporting categories based on associated OSP in service (Accounts 241 through 244).
	Allocate maintenance of overseas facilities to reporting categories based on the number of associated circuits in service.
603-02 Service Order Testing	Directly assign the portion indentified in JSP data as Private Line to the Private Line reporting category. Allocate amounts identified in the JSP as Message interexchange to the MTS and WATS categories based on the distribution outside plant and interexchange central office plant in service.
603-04 Trunk Testing	Allocate circuit testing to reporting categories using an analysis of reported testing hours.
	Overseas testing allocated to reporting categories based on number of circuits in service.
	Allocate facilities testing to reporting categories based on associated interexchange (IX) OSP and COE plant in service, excluding overseas.
604 COE Repairs	Directly assign the Service Engineering portions of Account 604 to the private line reporting category.
	Directly assign #4ESS international generic program costs to MTS.
	Allocate the circuit rearrangements and change portions of Account 604-07 and Account 604-08 (less Service Engineering) to reporting categories based on number of IX circuit sections.

Operating Expense Accounts	*Allocation Procedures*
	Allocate overseas facility terminal equipment maintenance to reporting categories based on associated number of circuits.
	Allocate the remainder of Account 604 to reporting categories based on associated COE plant in service.
605 Station Equipment Maintenance	Allocate Account 605 to reporting categories based on station equipment plant in service (Accounts 231, 232 and 234).
606 Buildings and Grounds	Allocate to reporting categories based on investment in buildings.
610 Maintaining Transmission Power	Allocate to reporting categories based on COE plant (Account 221) separately for domestic and overseas.
612 Other Maintenance	Allocate to reporting categories based on combined Accounts 602 through 606 and 610.
	Allocate Accounts 621-231 (network administration staff) to reporting categories based on the combined attribution of Accounts 624-222, -622 and -722.
	Allocate the remainder (training and other staff) of Account 621-03 based on the combined attribution of Accounts 621-231, -331 and -431.
608 Depreciation	Allocate to reporting categories based on the depreciable classes of plant in service using applicable depreciation rates. (Ocean cable depreciation is allocated separately based on the ocean plant in service in each category.)
609 Extraordinary requirements	Allocate to reporting categories based on special analysis of accounting records.
613 Amortization of Intangible Property	Allocate to reporting categories based on total attributable expenses.
614 Amortization of Plant Acquisition Adjustments	Directly assign to reporting categories based on special analysis of accounting records.
621-01 General Traffic Supervision (Except Accounts 621-311 and 316.)	Allocate to reporting categories based on Account 624 less 624-22 and 624-25.
621-311/316/05 622-02/03, 624-25/629-08, 631-38 and 631-48 Business Services	Allocate to reporting categories using data from a Business Service time reporting system.

Operating Expense Accounts	*Allocation Procedures*
621-03, 624-22, 629-07 631-37/47 Network Administration	Allocate Accounts 621-431, 624-222, 624-422 and 624-622 (switching and line and number administration) to reporting categories based on toll dial switching equipment plan in service. Allocate Accounts 621-331 and 624-322 (traffic load data administration) to reporting categories based on toll dial switching and switched services IX central office equipment and OSP plant in service, excluding dedicated overseas IX central office equipment and outside plant. Allocate Accounts 624-722 (Trunk Administration) to reporting categories based on switched services IX central office equipment plant and OSP plant in service, excluding dedicated overseas IX central office equipment and outside plant. Allocate Accounts 621-231 (network administration staff) to reporting categories based on the combined attribution of Accounts 624-222, -622 and -722. Allocate the remainder (training and other staff) of Account 621-03 based on the combined attribution of Accounts 621-231, -331 and -431. Allocate the remainder (supervision, training and other) of Accounts 624-22, 629-07, 631-37 and 631-47 based on the combined attribution of Accounts 624-222, -322, -422, -622 and -722.
622-01 Service Observing	Allocate to reporting categories based on Account 624 less 624-22 and 624-25.
624 (Except Accounts 624-22 and 624-25), Operators Wages less Network Administration and Business Services	Directly assign Private Line and overseas/international expenses to Private Line and MTS. Directly assign expenses incurred at 800 Service Switchboards to WATS. Determine expenses incurred at other switchboards associated with billed messages on the basis of traffic units. Allocate expenses associated with billed messages based on the relative number of MTS and WATS messages served by such switchboards. Allocate expenses associated with non-billed messages based on the relative number of total MTS and OUTWATS messages.
626 Rest and Lunch Rooms	Allocate to reporting categories based on Account 624 less 624-22, and 624-25. (Network Administration and Business Service portions of these accounts are treated above).

Operating Expense Accounts	*Allocation Procedures*
627 Operator's Employment and Training	Same as Account 626.
629 less -07 and -08 Co Stationery and Printing	Same as Account 626.
630 Co House Service	Same as Account 626.
631 less -37, -38, -47 and -48 Miscellaneous Co Expenses	Same as Account 626.
633 Other	Same as Account 626.
634 Joint Traffic–Debit	Same as Account 626.
635 Joint Traffic–Credit	Same as Account 626.
640 General Commercial Administration	Directly assign Service Management expense to reporting categories. Allocate remainder of Account 640 to service categories based on Account 643 for Long Lines and 645 for IXCs.
642 Advertising	Directly assign Long Distance Residence Sales, Long Distance Business Sales, Long Distance International, Long Distance Public, and Long Distance DIAL-IT to MTS. Allocate remainder based on total attributable expenses.
643 Sales	Allocate to reporting categories using the results from a sales time reporting system.
644 Connecting Company Relations	Allocate to reporting categories based on allocation of Independent Company settlements for interexchange facilities.
645 Commercial Operations	Allocate expenses to reporting categories using results from a work measurement plan and a sales time reporting system.
649 Directory	Allocate to MTS and WATS based on a count of MTS and WATS messages.
650 Other Commercial Expenses	Allocate expenses based on Account 643 for Long Lines and 645 for IXCs.
661 Executive Department	Allocate based on total attributable expenses.

Operating Expense Accounts	*Allocation Procedures*
662 Accounting Department	Allocate Revenue Accounting to reporting categories based on analysis of Revenue Accounting Offices. Allocate remainder to reporting categories based on total attributable expenses.
663 Treasury Department	Allocate to reporting categories based on plant in service.
664 Law Department	Directly assign overseas legal expenses to overseas services based on analysis of records. Directly assign outside legal consultant fees and associated costs based on analysis of applicability to a category. Allocate remainder to reporting categories based on total attributable expenses.
665 Other General Office Salaries and Expenses	Allocate Personnel, Account 665-03, to reporting categories based on Maintenance, Traffic, Commercial and Revenue Accounting salaries. Directly assign Service Engineering expenses (Portion of 665-09) to the private line category. Allocate Account 665-29, Customer Services, to categories based on reported hours. Allocate Account 665-149, Central Office Planning and Engineering, based on toll dial switching equipment plant in service. Allocate remainder based on total attributable expenses.
668-669 Insurance and Accidents and Damages	Allocate to reporting categories based on plant in service.
670 Earth Station Expenses	Allocate to reporting categories based on Account 100.5.
671 Operating Rents	Allocate circuit and miscellaneous rents to reporting categories based on interexchange OSP and Circuit equipment and toll switching equipment plant in service. Allocate rents paid to affiliates to Message and the Private Line reporting category based on number of circuits. Message rents are allocated to MTS and WATS based on number of minutes. Directly assign international satellite rents incurred for services that can only be provided on satellite facilities directly to reporting categories. Allocate remaining international satellite

Operating Expense Accounts	*Allocation Procedures*
	rents to reporting categories based on total international voice-grade circuits in use.
	Allocate domestic satellite rents to reporting categories based on domestic satellite circuits in use.
	Allocate building space rents to reporting categories based on the combined Accounts 643, 645 and Revenue Accounting portion of 662.
672 Relief and Pensions	Allocate to reporting categories based on Maintenance, Traffic, Commercial, and Revenue Accounting Salaries.
673 Telephone Franchise Requirement (dr)	Allocate based on the total investment in Account 100.1.
674 and 691 General Services and Licenses	Payment for services rendered by an affiliated company shall be assigned to expense categories in the same manner as expenses that are incurred directly by AT&T or a carrier subsidiary and shall be apportioned in the same manner as such directly incurred expenses.
675 Other Expenses	Allocate to reporting categories based on plant in service.
676 Telephone Franchise Requirements (cr)	Allocate based on the total investment in Account 100.1.
677 Expenses Charged Construction (cr)	Same as Account 675.

Income Accounts–FDC Methods Subsection

Income Accounts	*Allocation Procedures*
Gross Service Revenues (Accounts 510-516)	Directly assign to reporting categories based on accounting records.
Earth Station Revenue (Account 522)	Allocate to reporting categories based on the allocation of international satellite rent expense.
Directory Advertising and Sales	Directly assign to MTS.
Rent Revenues (Account 524)	Directly assign to reporting categories based on accounting records.
Other Operating Revenues (Account 526)	Allocate to reporting categories based on gross revenues (Accounts 510-526) less Account 526.
Uncollectibles (Account 530)	Allocate to reporting categories based on an analysis of accounting records.

Income Accounts	*Allocation Procedures*
Independent Company and Foreign Settlements	Allocate based on revenue account charged.
Miscellaneous Income Charges (Account 323)	Allocate based on plant in service (Account 100.1).
Interest on Customer Deposits	Allocate based on total investment in Account 100.1.

Taxes–FDC Methods

Type of Tax	*Allocation Procedures*
Gross Receipts Taxes	Allocate based on the allocation of reporting category revenues.
Social Security Taxes (Account 307-05)	Allocate based on the apportionment of Maintenance, Traffic, Commercial, and Revenue Accounting salaries.
Ad Valorem Taxes (Account 307-01)	Allocate based on the allocation of plant in service.
Income Adjustments for Income Tax Determination	Allocate depreciation of capitalized items, Relief and Pensions, and Social Security Taxes capitalized based on plant in service. Allocate Operating Fixed Charges based on the allocation of net investment.
State and Local Income Taxes (Account 307-02)	Allocate the actual tax incurred based on the state and local taxable income for each reporting category (net revenue less expenses, income charges, taxes excluding Federal Income Taxes, and income adjustments).
Amortization of Investment Credits	Allocate based on the allocation of plant in service.
Federal Income Tax	Allocate to reporting categories by multiplying the statutory rate times the Federal taxable income for each reporting category (net revenue less expenses, income charges, other taxes, and income adjustments).

SEPATATE STATEMENT OF COMMISSIONER. MIMI WEYFORTH DAWSON

re:

American Telephone and Telegraph Co. Manual and Procedures for the Allocation of Costs
CC Docket 79–245

The "proper" allocation of the costs of AT&T's interstate services has been a regulatory issue before the Commission for more than two

decades. The Commission's concern with AT&T's allocation of costs was a direct result of its decisions authorizing both private and public transmission systems in competition with AT&T's existing interstate transmission services.[1] In particular, the Commission instituted Docket 14251 in 1961 to investigate AT&T's TELPAK tariff, a bulk private line service offering substantial discounts to large users. In effect, TELPAK was AT&T's pricing response to the anticipated competition from private microwave systems authorized by the Commission in its *Above 890* decision in 1959. The TELPAK tariff underscored a potential weakness of the Commission's policy authorizing the construction of private telecommunications facilities, namely, AT&T's reaction to competitive threats to its private line market. For the first time, the Commission was confronted with assessing the lawfulness of AT&T's interstate rate *structure* rather than simply the lawfulness of AT&T's aggregate interstate revenue requirement.

The TELPAK tariff represented a new and paradoxical issue for the Commission. Prior to its nascent policy of "selective competition," the Commission's common carrier regulatory responsibility focused, in theory, on the avoidance of monopoly pricing by AT&T. Through the informal regulatory technique of "continuing surveillance," the Commission attempted to offset the profit-maximizing incentive of a monopoly firm to raise rates and restrict output. The TELPAK tariff represented just the opposite problem, namely, private line rates that may be too *low*. While users who qualified for TELPAK rates would clearly benefit from TELPAK's substantial discounts, the Commission was forced to determine whether AT&T's large private line customers were being cross-subsidized by users of switched network services or other private line users who could not qualify for TELPAK's reduced rates. Thus began the Commission's fifteen-year odyssey in search of a "costing standard" that would allow it to assess the lawfulness of AT&T's rate structure for its interstate services. The Commission's quest for such a costing standard finally ended in 1976 after merging the records of a number of related dockets and issuing a *Memorandum Opinion and Order* in Docket 18128.[2]

The decision in Docket 18128 was controversial when it was adopted and has remained so in subsequent years. In brief, the decision prescribed "fully distributed cost" (FDC) as the Commission's benchmark for lawful rates for AT&T's interstate services. In particular, Method 7, based on the principle of "historical cost causation," was prescribed as the costing method that AT&T must follow in setting rates for its interstate switched and private line

[1] See *Above 890* decision, 27 FCC 359 (1959); *Domsat* decision, 35 FCC 2d 844 (1972); and *Specialized Common Carrier* decision, 29 FCC 2d 870 (1971).

[2] *Private Line Services (TELPAK)*, 61 FCC 2d 587 (1976).

services. The decision, however, only established "guidelines for a 'proper methodology,'" not a set of detailed procedures implementing the principle of historical cost causation. The decision ordered that AT&T (and Western Union) consult with the staff of the Common Carrier Bureau to revise FDC Methods 1 and 7. The current proceeding in Docket 79–245, which began in September, 1979, was initiated to develop a FDC implementation manual that would establish final rules and procedures for implementing the principles of Docket 18128.

The "Interim Cost Allocation Manual" (ICAM) adopted by the Commission in December, 1980, differed in a number of fundamental ways from the principles established in the Docket 18128 decision.[3] Nevertheless, the *Report and Order* stressed that the ICAM was only an interim methodology that the Commission would accept to satisfy an order of the U.S. Court of Appeals for the District of Columbia Circuit to adopt a cost allocation manual by December, 1980. The Commission stressed, however, that the search for a longer term cost allocation manual in Docket 79–245 would continue.

The Commission has yet to adopt a longer term or "permanent" cost allocation manual in Docket 79–245. The order just adopted by the Commission in this docket is simply another in a series of "adjustments" to the ICAM, required in the present instance by the Commission's reconsideration of the *Access Charge* decision in Docket 78–72. The Commission, however, should begin now to focus on the longer term aspects of this proceeding. In brief, the Commission should decide very soon what role FDC methodologies in general and cost allocation manuals in particular should play in the post-divestiture regulation of AT&T. While the Commission should make its decision on the appropriate longer term cost allocation manual after developing an appropriate record, I believe that the Commission should be prepared to entertain and potentially support as an appropriate option the possibility that a longer term cost allocation manual should *not* be adopted by the Commission.

The logic for not adopting a longer term cost allocation manual can be appreciated by reviewing briefly the Commission's goals in Docket 18128. In this proceeding, the Commission held that

> . . . our statutory mandate and our rules manifest our paramount responsibility to ensure carrier accountability for the rates, charges, practices and rules prescribed by the carrier.[4]

Ensuring carrier accountability is one of our primary objectives and responsi-

[3] AT&T Manual and Procedures for the Allocation of Costs, 84 FCC2d 384, *recon. denied*, 86 FCC2d 667 (1981), *affirmed sub nom.* MCI Telecommunications Corp. v. FCC ("ICAM"), 675 F.2d 408 (D.C. Cir. 1982).

[4] 61 FCC 2d at 610.

> bilities. All parties appear to agree that an established carrier should be held accountable for its pricing and investment decisions.[5]
>
> . . . we find that accountability should be implemented across all services and for anticipatory (continuous surveillance) as well as retrospective purposes. Thus, accountability is the touchstone of the 'just and reasonable' provision of Section 201.[6]

Carrier accountability, therefore, was the major goal of the Docket 18128 proceeding. By prescribing a FDC methodology, the Commission hoped that AT&T's managerial discretion in the assignment of costs to its interstate services could be controlled and unlawful interservice cross-subsidization could be avoided.

While carrier accountability was the major Commission objective in Docket 18128, other objectives were also identified including

> . . . ensuring equitable and non-discriminatory treatment of all service users (generally referred to herein as 'equity'), promoting efficiency and providing a precise and clear set of market rules for planning and decision making purposes.[7]
>
> We find our obligation to promote efficieny [sic] and innovation to encompass cost definition, minimization, and allocation. Furthermore, we recognize the interdependence of efficiency and costing. We do not limit our considerations of efficiency only to measurable transactions, but realize that the public interest may be served by recognizing factors not directly traceable to the marketplace. Thus, our concept of efficiency incorporates such considerations as equity and social welfare. It is, therefore, broader than that espoused by economists or individual carriers. Accordingly, our selection of a proper costing methodology from this standpoint will be determined by defining the term 'optimal' in a fashion quite apart from the 'relevant ratemaking factors' used by Bell.[8]
>
> A final major objective of the Commission is clarification of market rules. In general, these concern market entry and exit, proper supporting material for tariffs, rate level floors and ceilings, interservice rate relationships, and the myriad of other marketplace specifications needed by suppliers for proper decision making and planning. The Commission's prior decisions encouraging competition in certain markets were made to attract those firms which will prove over time to be viable and effective alternative sources of supply. Such firms should be able to accurately gauge the attractiveness of communications markets with full knowledge of the rules pertaining to their own and the established carriers' opportunities, responsibilities, and limitations. For example, in other proceedings, we have endeavored to provide rules regarding interconnection and service and equipment definitions. In this proceeding our attention is directed to ratemaking principles. Our findings and conclusions herein are intended to provide the rules necessary to properly relate costs and both relative rates and rate levels. They should dissuade both incipient and established suppliers from participating in a particular service area because of the presumption that 'protective umbrellas' will offset any patent inherent economic shortcomings.[9]

The goals of Docket 18128 were maintained when Docket 79–245

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[5] Ibid.
[6] Ibid., p. 612.
[7] Ibid.
[8] Ibid, p. 615.
[9] Ibid.

began. In its initial *Notice of Inquiry* in Docket 79–245, the Commission held that

> We continue to believe . . . that it is appropriate and necessary for the Commission to prescribe a set of rules and procedures to be followed in allocating costs of service in accordance with the broad principles of Docket 18128.[10]

> We would like the parties to comment upon the validity of the overall procedures set forth in the existing cost manuals and used by AT&T to allocate its costs. In particular, the parties might address whether the inherent complexity of AT&T's cost allocation process—when considered as a whole—makes it inconsistent with the Commission's regulatory objective of 'carrier accountability.'[11]

I believe that any further proceedings in Docket 79–245 focused on the eventual prescription of a long term or permanent cost allocation manual should begin by re-examining the goals that the Commission has established for this proceeding. The goal of "carrier accountability" may have been an important goal of regulatory policy in 1976 when competitive entry was restricted to the interstate private line market and MTS/WATS was a de facto monopoly service. The Commission's experience with the TELPAK tariff certainly appears sufficient to warrant concern that AT&T's pricing of interstate private line services may burden the MTS/WATS ratepayer and frustrate the market entry of competing carriers. But much has changed since 1976. The interstate MTS/WATS market has been opened to competitive entry; additional facilities-based carriers and resellers have entered the private line and switched services market; satellite capacity has grown substantially; private networks and bypass technologies have proliferated; a new mechanism for recovering the interstate costs of local exchange plant will be implemented next year; and the divestiture of the Bell operating companies from AT&T in 1984 will radically alter the structure of the Bell System and its incentives. Given such changes in technology, regulatory policy, and industry structure since 1976, it is not obvious to me that carrier accountability implemented by cost manual regulation should remain the focal point of the Commission's regulatory policy towards AT&T.[12]

In theory, cost-of-service or cost manual regulation is a regulatory tool designed to detect and prevent unlawful cross-subsidy among the tariffed services of a regulated firm offering both *monopoly* and "competitive" services. As I have already suggested, it is increasingly difficult to characterize the interstate MTS/WATS market as an

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[10] *Manual and Procedures for the Allocation of Costs*, 73 FCC 2d at 631 (1979).

[11] Ibid., pp. 633–634.

[12] Carrier accountability may remain an important goal of regulatory policy at the state level where local telephone companies remain de jure monopolies and competition with the local exchange carrier is not highly developed.

AT&T "monopoly market" that should remain fully subject to all forms of classic public utility regulation.[13] Any aspect of the regulation of AT&T should, in my opinion, closely track both the actual state of market development and its likely path of evolution. From this perspective, the goal of carrier accountability achieved through cost manual regulation of AT&T seems somewhat out of focus as the target of regulatory policy for the 1980s. The emergence of actual and potential competition seems, in my view, much more likely to compel carrier accountability by AT&T than FDC pricing rules or cost manual regulation.

If cost manual regulation of AT&T were essentially "costless" to both ratepayers and AT&T shareholders, then such regulation may not be objectionable if significant public interest benefits can also be identified. If the trend toward growing competition in the interstate transmission market continues and if equal access becomes available to all intercity carriers in the next several years, the public interest benefits of cost manual regulation, a surrogate for competition, seem increasingly doubtful. Even worse, FDC pricing rules impose costs on both carriers and customers in addition to the direct costs of regulatory compliance. For example, a FDC methodology that allocates "shared costs," i.e., common and joint costs taken together, on the basis of relative use may lead to equal prices for all subperiods despite peak loads that should be reflected in time-of-day rates.[14] To offset this result, regulators may be forced to extend their regulatory reach and prescribe on an ad hoc basis the actual rate structure for a given service.[15]

Many additional criticisms of FDC as the basis for public utility

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[13] AT&T clearly retains a substantial share of the current interstate MTS/WATS market. Nevertheless, if competition continues to develop, such dominance need not mandate ongoing public utility-type regulation of AT&T any more than IBM's dominance in the computer mainframe industry warrants rate base regulation. For further discussion of this point and an analysis of the appropriate regulation of AT&T following divestiture, see Michael L. Katz and Robert D. Willig, "Deregulation of Long Distance Telephone Services: A Public Interest Assessment," *Discussion Papers in Economics* No. 7, Woodrow Wilson School of Public and International Affairs, Princeton University, 1983. The removal of regulatory entry barriers and the actual entry of fringe competitors in the interstate MTS/WATS market have enhanced the "contestability" of this market and diluted to some extent AT&T's market power in this market, despite only a modest reduction in AT&T's market share. For a recent discussion of the relationship between market share and market power, see Landes & Posner, "*Market Power in Antitrust Cases*," 94 *Harv. L. Rev.* 937–96 (1981).

[14] See Gerald R. Faulhaber, "Peak-Load Pricing and Regulatory Accountability" in *Problems in Public Utility Economics and Regulation*, 133–42 (M. Crew, ed., 1979).

[15] The Commission did precisely this in ordering a time-of-day rate structure for WATS. See *AT&T Wide Area Telecommunications Service (WATS)*, 86 FCC 2d 820 (1981).

ratemaking have been explored in regulatory proceedings over the years.[16] There is little need, therefore, to review these criticisms at any length here. Suffice it to say that FDC pricing distorts the allocation of resources and thwarts the realization of economic efficiency by ignoring marginal cost; may produce "umbrella pricing" that protects inefficient competitors; and prevents the rapid adjustment of prices to changing demand and costs. Moreover, the concept of interservice cross-subsidy as defined in terms of FDC is controversial, i.e., equal rates of return on the allocated costs of each service may bear little relationship to rigorous notions of "subsidy-free" prices.[17] Furthermore, it is no longer self-evident that regulatory policy centered on the elmination of *all* interservice cross-subsidy is necessarily in the best interests of consumers in all circumstances. Even "Ramsey optimal" pricing, i.e., public utility pricing that maximizes a static measure of consumer welfare subject to a revenue requirements constraint,[18] may itself involve interservice cross-subsidy.[19] Thus, regulators attempting to eliminate all interservice cross-subsidy may wind up actually reducing aggregate ratepayer welfare.[20] It is also possible that FDC pricing, absent strategic behavior by the regulated entity, may create an incentive for a partially regulated firm to set prices in its unregulated markets or markets with low allowed rates of return that exceed the prices that would prevail in the absence of regulation.[21]

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[16] A summary of some of the major problems is provided by Braeutigam, *An Analysis of Fully Distributed Cost Pricing in Regulated Industries*, 11 *Bell J. of Econ.* 182–96 (1980).

[17] Most rigorous concepts of interservice cross-subsidy have been framed as problems in game theory and the recent theory of sustainability. For an introduction to this approach to cross-subsidy analysis, see *W. Sharkey, The Theory of Natural Monopoly* 102–09 (1982). *See also W. Baumol, J. Panzar & R. Willig, Contestable Markets and The Theory of Industry Structure* (1982); Faulhaber & Levinson, *Subsidy Free Prices and Anonymous Equity*, 71 *American Econ. Rev.* 1083–91 (1981).

[18] The elements of Ramsey pricing are summarized by Brock, *Pricing, Predation, and Entry Barriers in Regulated Industries*, in *Breaking Up Bell: Essays in Industrial Organization and Regulation*, (D Evans, ed., 1983).

[19] *See* Baumol, Fisher, & ten Raa, *The Price-Iso Return Locus and Rational Rate Regulation*, 10 *Bell J. of Econ.* 648–58 (1979).

[20] Much of the formal analysis of the limitations of FDC is couched in terms of static economic analysis and may set an unrealistic standard for criticism of real-world applications of FDC methodologies. Even Ramsey-optimal pricing, a common benchmark for analyzing the infirmities of FDC pricing, is itself usually cast in a static theoretical framework. The essential point of these static economic analyses of FDC pricing rules is that such rules *may* imply substantial reductions in economic efficiency and ratepayer welfare and that regulators should be especially mindful of the social costs that ratemaking based on FDC may imply. Implicit in such criticisms is the view that regulators should consider less costly, alternative mechanisms for pursuing their public interest objectives.

[21] Sweeney, *Welfare Implications of Fully Distributed Cost Pricing Applied to Partially Regulated Firms*, 13 *Bell J. of Econ.* 525–33 (1982).

I am not optimistic that further proceedings in Docket 79–245 will produce conceptual breakthroughs that will neutralize the perverse incentives and economic inefficiencies inherent in FDC pricing. Moreover, attempts to develop cost-based tests for predatory behavior for unregulated firms and markets have proven to be controversial both in theory and application.[22] Consequently, I propose that further proceedings in this docket, if any, should focus not on the goal of carrier accountability via FDC rules but on the delineation of "market rules," a subsidiary goal of Docket 18128.

A reorientation of the Commission's regulatory objectives away from carrier accountability via cost manual regulation of AT&T and toward a market rules approach is fully consistent with the Commission's pro-competitive policies.[23] A market rules approach is also fully supportive of the Commission's concerns that AT&T may have dominant firm incentives to delay the evolution and development of a competitive market in long distance telecommunications.[24] In brief, if competition in the interstate transmission market continues to develop, then a market rules approach could be substituted for cost manual regulation of AT&T's interstate services. Until the Commission is confident that competition in the interstate market for long distance telecommunications is developed sufficient-

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[22] At a conceptual level, the definition of predatory pricing for just a single-output firm has resulted in an extensive debate among economists. See, for example, the debate between Areeda and Turner, who articulated a cost-based test for predatory pricing in 1975, and Scherer. (Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 *Harv. L. Rev.* 697–33 (1975) and the comment by F.M. Scherer and reply by Areeda & Turner, 89 *Harv. L. Rev.* 869–903 (1976).) Cost-based tests for multioutput firms would be more complex conceptually and more difficult to apply empirically.

[23] The market rules approach to the transitional regulation of AT&T is briefly discussed by Duvall, *The Conceptual Framework of Common Carrier Policymaking at the Federal Communications Commission in Recent Years: An Economist's Perspective*, in *University of Missouri Extension Publications, Proceedings of the 1981 Rate Symposium on Problems of Regulated Industries* 351–74 (1981). A more complete exposition is provided by Preece & Morris, *A Roadmap For Deregulating AT&T*, a paper presented at the Eleventh Annual Telecommunications Policy Research Conference, Annapolis, Maryland, April 26, 1983.

[24] Models of dominant firm conduct relevant to the telecommunications industry have been developed by Gerald W. Brock and William A. Brock. See *G. Brock, The Telecommunications Industry: The Dynamics of Market Structure* (1981); *W. Brock, Pricing Predation, and Entry Barriers in Regulated Industries*. These models analyze the incentives for a regulated dominant firm to invest in "barrier-to-entry" capital, i.e., investment in such activities as protracted regulatory proceedings that impose substantial sunk costs on potential competitors so that market structure can be influenced to the advantage of the incumbent regulated firm. These dynamic models stress the policy significance of barrier-to-entry capital rather than interservice cross subsidization as potential threats to the emergence of competitive telecommunications markets. Indeed, under certain assumptions, it can be argued that interservice cross-subsidization is generally not a highly-attractive predatory strategy for a rate base regulated firm. On this controversial point, see Brock, "Pricing, Predation, and Entry Barriers in Regulated Industries," pp. 205–213.

ly to warrant complete deregulation of AT&T, market rules would *directly* constrain certain aspects of AT&T's dominant firm behavior that may, intentionally or not, threaten the development of competition.[25] For example, AT&T could continue to file tariffs for services that the Commission has determined that AT&T still retains substantial market power.[26] However, *all* tariffs would allow unlimited resale and sharing. Cost-support data as presently prescribed by Section 61.38 of the Commission's Rules could be waived, and no FDC methodology for justifying tariffs would be required. Price discrimination based on the *identity* of the user could be prohibited.[27] Thus, all tariff distinctions designed to segment users by service classification would be unlawful. Time constraints on the offering and terminating of tariffed services could be imposed to prevent AT&T from generating price uncertainty ("price randomization") that may increase the risk of entry by resellers and other potential competitors.[28] In brief, the prescription of easily monitored and enforced market rules would *directly* constrain AT&T's pricing conduct that may deter entry by competitors or otherwise retard the rapid development of competition.

A major infirmity of cost manual regulation is clearly illustrated in the instant ICAM order. Abrupt variations in the allocation of costs to the Private Line, MTS, and WATS reporting categories may result in substantial rate increases or decreases for AT&T's interstate services, although the underlying *economic* costs of either switched or private line services may have changed only slightly. For example, changes in the ICAM resulting from the Commission's *Access Charge Reconsideration* Order, such as the inclusion of only open-end WATS minutes for apportioning interstate non-traffic sensitive local exchange investments between MTS and WATS and the allocation of surcharges on private lines, will have an impact,

[25] FDC pricing rules are, in effect, *indirect* methods for regulating the prices of the regulated firm, i.e., extensive cost support materials must be organized and presented to the regulatory agency to "justify" the tariffed rates.

[26] The Commission may determine at some point that AT&T lacks market power in certain of its interstate transmission services. The Commission could then detariff such services and treat them as if they were provided by a non-dominant carrier.

[27] Price discrimination based only on the volume of usage would not be prohibited, however. If subject to resale (which constrains the amount of price discrimination to the costs of performing arbitrage), such volume-based pricing may have beneficial effects for ratepayers in the aggregate. An overview of the theory of volume-sensitive pricing is provided by *L. Philips, The Economics of Price Discrimination* 166–75 (1983).

[28] This problem is briefly discussed in Duvall, "The Conceptual Framework of Common Carrier Policymaking . . .," p. 373. A formal model of entry-deterring price randomization is proposed by Brock, "Pricing, Predation, and Entry Barriers in Regulated Industries," pp. 220–226. *See also*, Baumol, *Quasi Permanence of Price Reduction: A Policy for Presentation of Predatory Pricing*, 89 *Yale L.J.* 1–26 (1979).

possibly substantial, on the "allocated costs" of AT&T's interstate services. Such arbitrary change in the allocation of costs may result in new switched and private line rates that may exacerbate the economic dislocations for some user groups. Moreover, such arbitrary reallocations of AT&T's interstate costs may have unintended effects on the emergence of intercity transmission competition. For example, to the extent that many non-dominant carriers rely on resold WATS to complete their nationwide switched services, abrupt changes in the allocation of costs to WATS may have unintended effects on non-dominant carriers that may thwart the rapid development of competition in the intercity transmission market. Similarly, carriers providing WATS-equivalent services may be suddenly disadvantaged as a result of a change in the apportionment of costs, even though the underlying economic costs may not justify the new rates based on the reallocated embedded costs. These, among other adjustments to the ICAM resulting from the *Access Charge Reconsideration* Order, may result in "rate churning" if AT&T is still required to target the earnings of each service category to the authorized interstate rate of return. To relax, however, the ICAM's service-specific rate-of-return constraint to avoid sudden rate dislocations undercuts the very rationale for cost manual regulation, i.e., carrier accountability for the investment and expenses allocated to each service category and avoidance of interservice cross-subsidy as defined in terms of the ICAM.

This current dilemma of cost manual regulation of AT&T need not require the Commission to invest heavily in improved techniques of cost manual regulation. Indeed, I believe there will be little return on the investment. In all probability, the time has passed for such a protracted regulatory investigation. A market rules approach is an appealing alternative. I hope the Commission will explore the possibility of eliminating cost manual regulation of AT&T either in a later phase of Docket 79–245 or as a part of the forthcoming *Notice of Inquiry* concerning the post-divestiture regulation of AT&T.

COMSAT, Financing

Memorandum Opinion and Order adopted concerning the consolidated capitalization plan Communications Satellite Corp. for the period 1983–1985.
–COMSAT

FCC 83–273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of The Consolidated Capitalization Plan for 1983–1985 of the Communications Satellite Corporation (Comsat)	I-S-P-83–002

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released June 13, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING

1. On January 24, 1983, the Communications Satellite Corporation (Comsat) submitted for our consideration the above-captioned consolidated capitalization plan (Capitalization Plan) to finance the activities of the parent company[1] and its subsidiaries[2] from 1983 to

[1] The term "parent company" refers to the Communications Satellite Corporation. The activities of the parent company include, but are not limited to, those undertaken by its World Systems Division in furtherance of the purposes and objectives of the Communications Satellite Act of 1962, as amended, 47 U.S.C. 701 *et seq.* (1962) and the International Maritime Satellite Telecommunications Act, 47 U.S.C. 751 *et seq.* (1979); research and development performed by or conducted under contract for Comsat Laboratories pursuant to Section 305(b)(1) of the Satellite Act, 47 U.S.C. 735(b)(1); and those general and administrative activities engaged in at Comsat's corporate headquarters in furtherance of statutory mandates. As the above activities are subject to our regulatory jurisdiction, we shall refer to them as "regulated". The parent company also engages in activities not subject to our regulatory oversight. We shall refer to such activities as "non-jurisdictional".

[2] COMSAT General Corporation (COMSAT General), Comsat General Integrated Systems, Inc. (CGIS), Comsat Technology Products, Inc., Comsat General Telesystems, Inc. (TSI), Amplica, Inc., Environmental Research & Technology, Inc. (ERT), Satellite Television Corporation (STC), and Comsat General Business Communications, Inc. (BCI). BCI is the vehicle through which COMSAT General participates as a one-third partner in Satellite Business Systems (SBS). STC is the subsidiary through which Comsat is engaged in the development of a direct broadcast satellite (DBS) service. Comsat's organizational chart is included here as Appendix I.

1985. Comsat seeks authority to implement its Plan pursuant to Section 201(c)(8) of the Satellite Act.[3] Public notice of this request was given on February 2, 1983. Report No. I-2035. No comments opposing it have been filed.

Background

2. *The Capitalization Plan Concept.* Comsat indicates that heretofore its requests to engage in financing activities under Section 201(c)(8) have been submitted and treated on an application-by-applications basis. Comsat now asserts that a capitalization plan subject to our approval under Section 201(c)(8) represents a more appropriate vehicle for the conduct of its financial operations. Comsat argues that while the *ad hoc* approach to the treatment of its Section 201(c)(8) requests to issue capital stock and to obtain external financing generally has been satisfactory in the past, such an approach will become increasingly burdensome for both Comsat and the Commission in the future. Recently, Comsat has begun to expand rapidly its activities in competitive markets. Comsat asserts that although it continues to build its existing satellite communications business through INTELSAT and INMARSAT and to sustain its commitment to these traditional rate-base-regulated international businesses, the Corporation's market strategy for the 1980's involves the application of its "expertise in satellite technology to develop selected new [satellite-based] services and enlarge the proportion of non-regulated activities in its overall business mix."[4]

3. Comsat indicates that, as it has expanded and diversified its business activities, its requirements for external financing have increased. Concomitantly, in order to take advantage of optimal market conditions and to obtain debt or equity at the lowest possible cost, Comsat has found it necessary to enter capital markets on relatively short notice. In Comsat's view, the individual requests for Section 201(c)(8) authority it would be required to submit during the 1983–85 period in the absence of a more comprehensive approach would likely exceed in number and frequency all those filed to date. Further, Comsat states that "consistent with the realities of today's financial markets, it can be expected that these applications will contemplate a number of creative financing options which will be effective only if accomplished within a limited 'window of opportunity'."[5]

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[3] Under Section 201(c)(8), the Commission shall "authorize [Comsat] to issue any shares of capital stock, . . . or to borrow any moneys, or to assume any obligation in respect of the securities of any other person, upon finding that such issuance, borrowing, or assumption is compatible with the public interest, convenience, and necessity and is necessary or appropriate for or consistent with carrying out the purposes and objectives of this Act by the Corporation." 47 U.S.C. 721(c)(8).

[4] Comsat 1982 Annual Report to Shareholders, p. 7.

[5] Capitalization Plan, p. 3.

4. These new circumstances form the basis of Comsat's concern with the *ad hoc* approach to Section 201(c)(8) matters. Comsat considers *ad hoc* determinations to have two major drawbacks. First, Comsat argues that the amount of time generally required for Commission action on individual Section 201(c)(8) requests may not always permit Comsat to acquire capital in a cost-effective manner. Consequently, to the extent that Comsat is unable to minimize its cost of acquiring capital, the ratepayer is burdened with the additional costs incurred. Second, to the extent that the *ad hoc* approach does not enable the Commission to consider the overall framework in which Comsat is conducting its financial operations, it frustrates the Congressional intent of Section 201(c)(8).[6]

5. Moreover, Comsat believes that there are public interest benefits to be derived from the Capitalization Plan concept. First, Comsat maintains that the Capitalization Plan provides the Commission with detailed information about Comsat's prospective activities in time to properly dispatch its statutory responsibilities. Second, the Plan provides the broad overview of Comsat's jurisdictional and nonjurisdictional activities and their impact on the ratepayer which generally is unobtainable under current practice of *ad hoc* review. Finally, Comsat submits that its Capitalization Plan will enable it to respond rapidly to fluctuations in capital markets, thereby providing it with sufficient flexibility to meet its consolidated financing needs on a cost-effective basis. For these reasons, Comsat considers its multi-year, comprehensive capitalization plan a viable concept worthy of Commission approval under Section 201(c)(8).

6. *Summary of the Plan.* As explained above, Comsat's Capitalization Plan encompasses the regulated INTELSAT/INMARSAT-related activities undertaken by the parent company's World Systems Division, the non-jurisdictional components of the World Systems Division and the non-jurisdictional activities of Comsat's various subsidiaries.[7] Projections of revenues, expenses, assets and

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[6] In support of this contention Comsat cites the Senate Report's section-by-section analysis of H.R. 11040, the bill ultimately enacted as the Satellite Act:

> [Section 201(c)(8] is considered important in carrying out the stated policy and purposes of the act of insuring that the benefits of this new technology are reflected in both the quality of communication services to be rendered by the corporation and the charges for such services. It is imperative that the corporation's capital structure be carefully regulated and controlled to avoid excessive capitalization or disproportionate amounts of equity or debt capital which could have adverse effects upon the corporation's revenue requirements and the changes for its services, and impair its ability to provide efficient and adequate service. S. Rep. No. 1584, 87th Cong., 2d Sess. 19 (1962).

[7] Comsat indicates that for the purposes of the Plan, other satellite systems operated by Comsat corporate elements and subject to Commission oversight (*e.g.*, services via the MARISAT and COMSTAR systems) are designated as "non-jurisdictional," as is Comsat's investment in the SBS partnership. Plan, Attachment 2, p. 1.

liabilities, sources and uses of funds and cumulative financing requirements are based upon the following assumptions: (a) that the projections set forth for STC reflect the two-satellite, Eastern Time Zone DBS system authorized by the Commission; (b) that Comsat's ownership interest in INTELSAT will decline from 24.1% in 1981 to 21.4% in 1985[8]; (c) that projections of the amount of additional debt financing needed do not include "non-recourse" financing by non-consolidated corporate affiliates, such as SBS; (d) that such projections do, however, include debt placed by the parent company and financing by consolidated corporate subsidiaries, such as STC; and (e) that Comsat's aggregated debt to total capital ratio will not exceed 35%.

7. Comsat has submitted three sets of actual and projected financial data for the years 1981 to 1985. One set, comprised of seven charts, was submitted on January 24, 1983 as Attachment 2 of the Capitalization Plan.[9] At the request of the Common Carrier Bureau's staff, Comsat submitted additional financial information on March 16, 1983.[10] After further discussions with the staff, Comsat submitted revisions of the March 16th materials on May 2, 1983. These revised materials consist of two sets of charts dated April 27, 1983. The first set, which includes six charts containing actual and projected financial information[11] and a chart depicting Comsat's current organizational structure, has been placed in the public file. The second set, consisting of seven charts,[12] represents a recasting of the March 16th materials for which confidential treatment was granted. Consequently, protection from general disclosure was also

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[8] Comsat anticipates greater usage of the system by others during the 1983–1985 time frame.

[9] These include a Balance Sheet-Consolidated; Assets & Liabilities-World Systems Division; Sources & Uses of Funds-Consolidated; Capital Requirements-Consolidated; Capital Spending-World Systems Division; Key Statistics-Consolidated.

[10] Part of this data was accorded protection for public disclosure as "commercial or financial information obtained from a person and privileged or confidential" under §§0.457(d) and 0.459 of the Commission's Rules, 47 C.F.R. §§0.457(d), 0.459, and exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4) (1976 & Supp. V 1980). Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; April 11, 1983.

[11] These include an Income Statement, World Systems Division; Assets & Liabilities, World Systems Division; Sources & Uses of Funds, World Systems Division; Inter-company Transactions; Inter-company Transactions-1981; Estimated Non-jurisdictional Components of World Systems Division.

[12] These include an Income Statement-Consolidated; Income Statement-Non-World Systems Division; Detailed Balance Sheet-Consolidated; Assets & Liabilities-Non-World Systems Division; Sources & Uses of Funds-Consolidated; Sources & Uses of Funds-Non-World Systems Division; Key Statistics-Consolidated.

extended to these materials, and the superseded March 16th charts were returned to Comsat.[13]

8. In these submissions, Comsat indicates actual 1982 capital expenditures of $136 million for its jurisdictional activities, and $89 million for non-jurisdictional ones. Comsat projects major capital investments in the regulated segment of the business of $179 million in 1983, $126 million in 1984 and $115 million in 1985. In addition, Comsat projects capital investments in non-jurisdictional businesses and activities, including progress payments on the purchases of satellites for STC and the construction of STC's Nevada operating center, of $178 million in 1983, $136 million in 1984 and $118 million in 1985. Taking the difference between these capital expenditures, the actual 1982 jurisdictional and non-jurisdictional cash flows[14] and the projected cash flows for regulated and non-jurisdictional activities, Comsat derives the following cumulative financing requirement (in $millions):

1982	*1983*	*1984*	*1985*	*Total*[15]
$151	$116	$111	$46	$424

9. Comsat indicates that while the substantial capital spending requirements in 1982–83 result in a sizable need for external financing during this period, this trend will reverse itself in 1984 and 1985; that is, regulated cash flows will exceed regulated capital spending during the period. Therefore Comsat will have additional stockholder profits derived from its jurisdictional operations which can be utilized to support its non-jurisdictional businesses and endeavors. Nevertheless, Comsat asserts that while approximately $75 million has been raised from its sale of one million shares of Comsat Common Stock in December of 1982,[16] an additional $125 million in new equity must be raised in the 1983–85 time period.

10. Comsat is confident that the company is sufficiently sound to engage in this and other undertakings described below without adversely affecting the ratepayer. This confidence is based in large measure on Comsat's projections of its total "capital capacity" and its "unused debt capacity." Comsat defines "capital capacity" as "the sum of the amount of debt that could be supported at each year-end,

[13] Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; May 13, 1983.

[14] Comsat defines "cash flow" as net income, depreciation, deferred items and amortization. Capitalization Plan, Attachment 2, p. 5.

[15] All figures in this paragraph have been derived from Attachment 2, Chart 4 of the Capitalization Plan and Public Chart 3, dated April 27, 1983.

[16] Section 201(c)(8) authorization to conduct this stock offering was granted in a letter, dated November 19, 1982, from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President, Communications Satellite Corporation.

assuming a maximum debt to total capital ratio of 35% . . . and the assumed stock proceeds in 1983–85."[17] Taking these variables into consideration, together with projected increases in revenues, cash flow and net income, Comsat estimates that its capital capacity will rise from $364 million in 1982 to $377 million in 1983, $588 million in 1984 and $607 million in 1985. To derive its "unused debt capacity"—which it defines as "the amounts [it] could borrow in addition to the present equity and debt in place (including treasury stock) while remaining within a 35% debt to total capital ratio"[18] — Comsat subtracts its projected cumulative year-end financing requirements from its capital capacity. Thus:

Unused Debt Capacity ($millions)

1982	*1983*	*1984*	*1985*
$213	$110	$210	$183

Comsat argues that this unused debt capacity protects its regulated businesses (and therefore the ratepayer) against a wide range of contingencies, adverse market conditions and the like. Further, Comsat argues that this "cushion" of protection could be further inflated through the issuance and sale of additional Comsat Common Stock.[19]

11. *Comsat's Proposed Guidelines and Procedures.* Comsat suggests that certain procedures be established to ensure that we will receive on a periodic basis sufficient information to enable us to determine that its individual financial transactions fall within the framework of the Plan. These procedures concern the updating of the Plan, periodic reporting and compliance with suggested financial guidelines.

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[17] Capitalization Plan, p. 6.

[18] *Id.*

[19] On April 18, 1983, Comsat was authorized to issue a maximum of 350,000 shares of Common Stock, without par value, pursuant to the exercise of options under its 1982 Employee Stock Option Plan. FCC File No. I-S-P-83–003; Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; April 18, 1983. On May 12, 1983, this authorization was modified to increase the number of exercisable stock option shares to 700,000, pursuant to our grant of authority under Section 201(c)(8) for Comsat to issue a sufficient number of additional shares of no-par-value Common Stock to effectuate a 2-for-1 split of each issued share. FCC File No. I-S-P-83–004; Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; May 12, 1983. On May 20, 1983, Comsat's shareholders approved the stock-split and amended Comsat's Articles of Incorporation to increase from 25 million to 40 million the number of shares of Common Stock authorized for issue. As a result of these actions, the Corporation now has 18,000,028 shares of Common Stock issued and outstanding, 2,000,000 shares which it holds in its treasury and 19,999,972 shares authorized but unissued.

A. *Annual Update of the Plan.* Comsat offers to submit on an annual basis actual financial information for the planning year just completed, projections for one additional planning year, and, if appropriate, adjustments to previously submitted projections. In terms of the Plan currently before us, Comsat would submit at the end of its annual budget cycle (early 1984), actual financial data for calendar year 1983, any adjustments to its current 1984–85 projections and new projections for 1986.

B. *Periodic Reporting.* Comsat will also submit periodic updates of actual financial transactions made during the planning period. These updates will consist of information presently submitted in Comsat's monthly FCC Forms 901 and quarterly Forms 10-Q filed with the Securities and Exchange Commission.

C. *Financial Guidelines.* While emphasizing its need to retain flexibility in terms of its ability to sell stock, raise debt, initiate new programs or delete existing programs, Comsat nonetheless accepts that these activities must be conducted within the parameters of its Capitalization Plan, should we choose to approve it. Consequently, Comsat has proposed guidelines by which its activities should be appraised. First, Comsat would seek external financing through 1985 in an amount not to exceed $440 million. Second, although it does not expect its debt to total capital ratio during the 1983–85 period to exceed that of 25.9% for 1983,[20] Comsat believes that, given everchanging market conditions, we should establish a maximum guideline of 35% debt to total capital. Comsat indicates that its investment bankers consider this to be a prudent ratio for the consolidated corporation.[21] Third, Comsat suggest that its maximum interest coverage under the Plan be set at 3.0.[22] This guideline would be applied prospectively, in the context of potential debt placements. Comsat believes that the use of a 3.0 ratio for the consolidated corporation is sound and conservative. Finally, Comsat has offered to provide notice of its plans to implement specific financing actions, the nature of these actions, the amount, and the principal terms thereof. In addition, Comsat will demonstrate that such activities are in compliance with the Plan and the guidelines as approved by the Commission.[23]

12. Although Comsat projects cumulative external financing needs of $424 million, the Corporation requests authority to raise up to $440 million from external sources during the 1983–85 period.[24]

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[20] Capitalization Plan, Attachment 2, Chart 7.

[21] Capitalization Plan, p. 10.

[22] *Id.* Comsat defines "interest coverage" as the ratio of pre-tax income to total investment requirements.

[23] Comsat also acknowledges that if it seeks to engage in any activities not contemplated in the Capitalization Plan or which may result in its exceeding any of the aforementioned guidelines, it must seek Commission review of the situation prior to undertaking such actions. Capitalization Plan, pp. 9–11.

Comsat seeks to utilize the additional $16 million as a contingency reserve to provide for what it characterizes as minor changes in capital requirements.[25] In support of this request, Comsat argues that since its proposed "contingency reserve" represents only a 4% increase over its projected financing needs, utilization of these additional funds would not significantly reduce the "cushion" of protection for its jurisdictional businesses described above.

13. Comsat believes that the data, and projections and descriptive information contained in its Plan are sufficiently comprehensive and accurate to enable us to make a finding that there will be no adverse impact on the ratepayer or on operations from the non-jurisdictional activities proposed for the 1983–85 period. Therefore, in Comsat's view, approval of the Plan will serve the public interest.

DISCUSSION

14. There are two issues raised by Comsat's proposal to finance its operations pursuant to its Capitalization Plan. The first is whether, in a general sense, the capitalization plan approach constitutes an acceptable alternative to our practice of *ad hoc* review under Section 201(c)(8). If we resolve this issue in the affirmative, we must determine whether to authorize the Capitalization Plan which Comsat has submitted.

15. In the *Comsat Study*,[26] we undertook a comprehensive examination of Comsat and its operations at the direction of Congress. One of our major tentative conclusions in the *Comsat Study* was that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT activities so long as such participation is not inconsistent with its statutory responsibilities. We affirmed this view in our decision in the *Comsat Structure* rulemaking,[27] a proceeding that we had initiated in order to provide for public comment on the proposals set forth in the *Comsat Study* for changes in Comsat's corporate structure and operations.[28]

16. One of the issues raised in the rulemaking proceeding was whether we should require Comsat to file a comprehensive capitalization plan for its existing and planned non-INTELSAT/INMARSAT activities. Upon review of the comments addressing this issue, we declined in our subsequent *Structure Order* to make such a requirement mandatory because we found that prior approval

[24] The total of $440 million includes $100 million in short-term debt previously authorized by the Commission, COMSAT, 88 FCC 2d 931 (1982); Comsat, 91 FCC 2d 859 (1982), and the $75 million realized from Comsat's December 1982 sale of treasury stock (n. 16 and accompanying text, *supra*).

[25] Capitalization Plan, p. 7.

[26] Communications Satellite Corporation, 77 FCC 2d 564 (1980) (Comsat Study).

[27] Communications Satellite Corporation, 90 FCC 2d 1159 (1982) (Structure Order).

[28] Communications Satellite Corporation, 81 FCC 2d 287 (1980) (Structure Rulemaking).

of such a plan was not the only way to meet our statutory responsibilities. We indicated that we could fulfill our responsibilities through *ad hoc* oversight of Comsat's individual investment decisions; that is, through review of Comsat's Title II and Title III applications and Section 201(c)(8) requests for authority to engage in financing activities. We emphasized, however, that Comsat was free to file a comprehensive capitalization plan if it so desired.[29]

17. The capitalization plan approach is not precluded as a matter of law under Section 201(c)(8). Nothing in that provision or in the Satellite Act as a whole and its legislative history mandate our practice of *ad hoc* review.[30]

18. The capitalization plan approach is also sound as a matter of policy. On the basis of Comsat's showing in the Plan before us, we are convinced that neither Comsat nor the public benefits from the delays inherent in the application-by-application approach to financing the activities of Comsat and its corporate affiliates. The capitalization plan approach better utilizes the agency's resources. Furthermore, it provides the Commission with a broad overview of Comsat's regulated and non-jurisdictional activities and is therefore useful for analytical purposes. Moreover, the capitalization plan approach to financing corporate operations is consistent with the manner in which businesses are run today. It is also consistent with our actions with respect to AT&T's capitalization plans, although the two situations are not completely analogous. *AT&T Co.*, 90 FCC 2d 404 (1982); *AT&T Co.*, 91 FCC 2d 578 (1982). Thus, we accept the comprehensive capitalization plan concept as a viable mechanism by which to fulfill our statutory oversight responsibilities under the 1962 Satellite Act.

19. Having approved the capitalization plan concept, we now turn to the issue of whether we should authorize the Plan as presented. Comsat submitted the Plan on January 24, 1983. The Plan was placed on public notice on February 2, 1983; no opposing comments were filed. Since that date, the staff of the Common Carrier Bureau has suggested that Comsat file additional information and revise the format of its financial projections. Comsat has

[29] 90 FCC 2d at 1197.

[30] To the extent that review of Comsat's financing activities under the capitalization plan approach would obviate the need to review Comsat's individual Section 201(c)(8) applications on an *ad hoc* basis, we find the capitalization plan approach consistent with those provisions of the Communications Act of 1934 related to the manner in which we may conduct our affairs. Section 4(i) of the Communications Act provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. 154(i) (1976). Section 4(j) provides, *inter alia*, that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." *Id.* at 154(j).

responded with the materials requested. In addition, Comsat has proposed guidelines for the implementation of its Plan, as well as reporting procedures designed to enable us to monitor its compliance with the Plan. Moreover, Comsat has acknowledged that should it propose to take a specific financing action that exceeds one or more of its suggested guidelines, the Corporation would be obliged to seek Commission review of the situation prior to initiating the action in question.

20. Having assessed the record developed in connection with Comsat's Capitalization Plan proposal, we conclude that Comsat's Plan is consistent with prior Commission determinations and the purposes and objectives of Section 201(c)(8). In particular, we find that Comsat's debt to total capital guideline of 35% is within the 45% level of debt we imputed to Comsat's capital structure in the 1975 *Comsat Rate Case*.[31] Second, on the basis of Comsat's projections of its capital and unused debt capacities during the 1983–85 period, we find that Comsat should be authorized to acquire external financing to meet its projected cumulated capital needs of $424 million through 1985. Third, we conclude that Comsat's request to acquire an additional $16 million to be used as a "contingency reserve" is not unreasonable.

21. The Commission is aware that as Comsat enters new competitive ventures, an element of risk is introduced into its business planning that did not exist when Comsat's main activity was the offering of monopoly, rate-base regulated services. Much of the Commission's effort in evaluating the Capitalization Plan was devoted to determining that Comsat's regulated responsibilities not be adversely impacted by its financing of unregulated ventures.[32] For this reason, the staff has requested and received from Comsat, during this period of review, financial data on both Comsat's jurisdictional and non-jurisdictional activities. Our review of this data permits us to authorize the Capitalization Plan under Section 201(c)(8), with the conditions outlined below. By this authorization, we are satisfying our statutory responsibilities under this provision with respect to all actions contemplated in the Plan. We believe that the continued oversight provided for by the Plan, coupled with these conditions, should enable us to protect the ratepayer should Com-

[31] We are not here altering our prior decisions in the Comsat Rate Case regarding the Corporation's capital structure and rate of return. Communications Satellite Corporation, 56 FCC 2d 1101, 1157–1160 (1975); Communications Satellite Corporation, 68 FCC 2d 941, 950–51 (1978). Rather, we are accepting Comsat's recommendation of 35% debt to total capitalization for the purpose of determining whether a specific financial transaction falls with the Plan.

[32] Furthermore, we are concerned that the ratepayer not assume as a "risk premium" any additional risk which Comsat must assume in capital markets to finance its competitive ventures. We shall address this concern in an appropriate proceeding.

sat's performance deviate significantly from the projections set forth in its Plan.

22. Therefore, we accept Comsat's Capitalization Plan subject to the following conditions: (1) that Comsat's cumulative external financing for the years 1982 to 1985 shall not exceed $440 million; (2) that Comsat shall acquire external financing on an annual basis consistent with its projected annual financing needs; (3) that Comsat's consolidated debt to total capital ratio during the period shall not exceed 35%; (4) that Comsat's interest coverage capacity during the period shall not fall below 3.0; and (5) that, on a yearly basis, Comsat shall submit actual financing data on the planning year just completed, projections for one additional planning year, and, if appropriate, revised projections for the two interim planning years.[33] We emphasize here that our acceptance of the Capitalization Plan does not prejudge any accounting issues outstanding in the *Comsat Structure* proceeding or alter the limitations placed on Comsat and its subsidiaries in *In re Application of Satellite Television Corporation*, 91 FCC 2d 953 (1982). We also accept Comsat's proposed reporting requirements. Therefore, Comsat shall submit FCC Form 901 on a monthly basis, and Form 10-Q on the same quarterly basis as it currently submits this information to the SEC. In addition, however, we shall also require Comsat to inform us immediately if at any time over the planning period it determines that any actual financial data which it has generated deviates from its submitted projections by more than 10%,[34] or if any contemplated financing activity may result in Comsat's deviating from the guidelines and projections outlined in its Plan.[35] Any such deviation would require separate Section 201(c)(8) approval. Finally, Comsat shall provide us with 10 calendar days' prior notice of all specific financing actions it plans to undertake in the implementation of its Plan.

Conclusion

23. Comsat's Capitalization Plan provides us a comprehensive overview of the operations of the parent company and its subsidaries. Our acceptance of it is for the initial three year period. Comsat must request Commission approval to obtain additional financing for

[33] This information shall be submitted in the precise format of the materials dated April 27, 1983 which Comsat filed with this Commission on May 2, 1983.

[34] For example, we expect Comsat to inform us promptly if its internally-generated data suggests that its capital spending for regulated activities in 1984 is likely to be $140 million, rather than $126 million as indicated in Attachment II, Chart 4 of the Capitalization Plan.

[35] For example, Comsat must inform us if its projected needs for external financing would be altered as a consequence of its use of internally-generated funds to support the SBS venture, or other "non-recourse" financing as described in paragraph 6, above.

subsequent planning years. In passing on such requests, the Commission undoubtedly will be influenced by its experience under this Plan as Comsat implements it over the initial period. Subject to the conditions we have set forth, the Plan should enable us to better monitor Comsat's financing activities and the effects of these activities upon the rates of its regulated services, in furtherance of the public interest. However, we emphasize that our acceptance of the 1983–85 Capitalization Plan in no way prejudges or prejudices our statutory right to conduct a rate or rate of return hearing at any time during the planning period if we deem it necessary or desirable.

Ordering Clauses

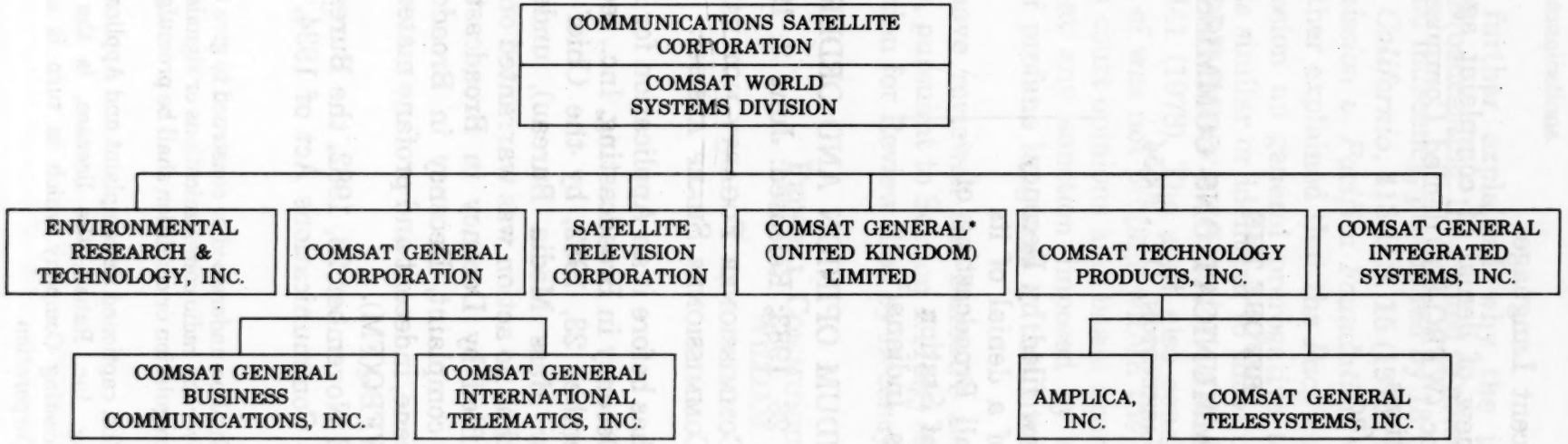
24. In view of the foregoing, IT IS ORDERED, that, pursuant to Sections 4(i) and 4(j) of the Communications Satellite Act of 1934, as amended, 47 USC 154(i) and 154(j) (1976), and Section 201(c)(8) of the Communications Satellite Act of 1962, 47 USC 721(c)(8) (1976), the Communications Satellite Corporation IS AUTHORIZED to implement its Capitalization Plan, presented on a consolidated basis, for the years 1983 through 1985.

25. IT IS FURTHER ORDERED, that the Communications Satellite Corporation, in the implementation of its Capitalization Plan, shall report to the Commission and adhere to the directives and conditions as set forth herein.

26. IT IS FURTHER ORDERED, that all proceeds derived from Comsat's December 1982 treasury stock sale and currently held in escrow by Comsat pursuant to prior Commission orders may be utilized in the implementation of its Capitalization Plan.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

COMMUNICATIONS SATELLITE CORPORATION AND ITS WHOLLY OWNED SUBSIDIARIES AT APRIL 1, 1983



*To be renamed COMSAT (U.K.) Limited upon requisite action by appropriate United Kingdom authorities.

Application for Review
Complaint, Formal
Obscene, Profane, Indecent Language

Application for review of denial of complaint against Rahall B/cing of Indiana, Inc. (WFBQ-FM) denied. Commission found no error in Bureau's actions.
–Decency In B/cing, Inc.

FCC 83–260

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Application for Review filed by Decency in Broadcasting, Inc., of a denial of its complaint against Rahall Broadcasting of Indiana, Inc., licensee of Station WFBQ(FM) Indianapolis, Indiana.[1]

MEMORANDUM OPINION AND ORDER

(Adopted: May 26, 1983; Released: June 3, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

1. The Commission has before it an Application for Review, filed December 27, 1982, by Decency in Broadcasting, Inc., seeking review of a letter dated November 23, 1982, by the Chief of the then Broadcast Bureau (now Mass Media Bureau), under delegated authority, determining that no action was warranted on the matters raised in a complaint filed by Decency in Broadcasting, Inc. on August 2, 1982. In its complaint, Decency in Broadcasting, Inc., alleged that certain obscene, indecent and profane material had been broadcast over Station WFBQ(FM).

2. In its letter dated November 23, 1982, the Bureau explained that Section 326 of the Communications Act of 1934, as amended provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by

[1] Decency in Broadcasting, Inc. captioned its complaint and Application for Review against Gulf Broadcasting, Inc. Rahall, the licensee, is the wholly owned subsidiary of Gulf Broadcasting Company which in turn is a wholly owned subsidiary of Gulf United Corporation.

the Commission which shall interfere with the right of free speech by means of radio communications.

The letter further explained why the information provided by Decency in Broadcasting, Inc., failed to meet the judicial standards of obscenity and indecency, prohibited by 18 U.S.C. § 1464, as specified in *Miller v. California*, 413 U.S. 15 (1973), and *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). The Bureau further explained that the *Pacifica* decision, *supra.*, affords the Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast. See also *WGBH Education Foundation*, 69 FCC 2d 1250, 1254, 43 RR 2d 1436, 1441 (1978). The staff also concluded that the language complained of was not profane within the meaning of that word as described in court opinions and, based upon current case law, it was unlikely that any sanction imposed by the Commission for the broadcast of profane language in this situation would be judicially upheld.

3. We have reviewed the Bureau's actions and find no error. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed by Decency in Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Acceptance of

Application for review denied. Since the applicant's proposed service area receives signals from three full-service stations and located less than 55 miles from 142nd largest television market, applicant's status as an existing licensee of a full-service UHF television station does not warrant a waiver of the Commission's freeze on the acceptance of new television translator applications and the application is therefore dismissed.
–Family Television, Inc.

FCC 83–363

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of

FAMILY TELEVISION CORPORATION, INC.

For Construction Permit for a New UHF Television Translator Station at Fort Myers, Florida

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1983 Released: August 4, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration a petition filed by the applicant, Family Television Corporation, Inc. (Family) for review of the Mass Media Bureau's return of the above-captioned application on July 30, 1982. The application was returned because it was filed after the imposition of the Commission's freeze on the acceptance of new translator and low power television applications and it failed to meet any of the exemptions to that freeze in effect at the time it was filed.

2. By way of background, on April 9, 1981, with insufficient staff and computer capability to handle the approximately 5,000 translator and low power television applications already on file, the Commission stopped accepting new applications. However, exceptions were made for: existing translators operating on Channel 70 through 83 seeking to change frequency to a lower channel; existing translators seeking to change channels to eliminate interference to full service stations; or new proposals to serve areas currently receiving fewer than two full-service stations. *Order Imposing Freeze*, 46 Fed. Reg. 26062, published May 11, 1981, 49 RR 2d 433. In effect, the Commission stopped accepting additional applications, except in

areas where the need for service outweighed the administrative burdens. In its *Report and Order* in BC Docket No. 78–253, 49 Fed. Reg. 21468, published May 18, 1982, 51 RR 2d 477, establishing a low power television service, the Commission did not lift the freeze, but did eliminate the freeze exemption for proposals to serve areas receiving fewer than two full-service stations. Instead, applications were grouped into categories by market size. Those applicants proposing to locate their transmitting antennas more than 55 miles from the coordinates of any of the top 212 television markets are placed in Tier I, *i.e.*, the most rural markets, and are now freeze exempt. Applicants other than those in Tier I are grouped in Tiers II and III by market size. Under the tiered system, processing of the first tier must be completed before processing of the second tier begins, and so on. In the interim, the freeze will be lifted only for the limited purpose of receiving competing applications to the applications published on cut-off lists. Only after the backlog of pending applications and freeze-exempt applications has been eliminated, in three phases, will the Commission lift the freeze on the filing of applications. The Commission believed that its adoption of such a processing hierarchy would facilitate the expeditious authorization of service in unserved or lesser-served rural areas, which was one of the Commission's principal goals in the establishment of a low power television service.

3. In its application for review, Family acknowledges that its proposed antenna will be located less than 55 miles from Fort Myers and Naples, Florida, which are each listed as the 142nd largest television market.[1] It is also noted that Fort Myers, Family's proposed community of license, already receives the signals of three full-service television stations. Therefore, Family concedes that its application could not be acceptable for immediate filing, since it is a Tier II application, absent a grant of its requested waiver of the Commission's freeze policy.

4. In support of its waiver request, Family notes that its application does not seek local origination authority; but, instead, proposes to retransmit the signal of a UHF full-service facility already licensed to Family, Station WFTS, Tampa, Florida. Family then makes an unsupported claim that it would be unjust not to accept an application for a translator filed by a full-service television station. Family's other arguments are of a similar general nature. Family also contends that the acceptance of its application will further the development of the UHF television service by enhancing the competitive comparability of Family's UHF facilities with existing VHF television stations. It is next asserted that Family's

[1] Data complied from "Television Channel Utilization," mimeo number 3331, dated April 16, 1982, as republished in Public Notice, FCC 82–297, released June 23, 1982, as corrected by Public Notice, mimeo number 5324, released July 23, 1982.

provision of a source of independent programming to Fort Myers will serve the public interest. Finally, Family notes that its proposed translator facility will create no interference with any other television facility nor preclude other applicants from applying for other low power facilities in Fort Myers.

5. In our low power *Report and Order*, at footnote 19, we noted that we would dismiss any requests for waiver of our freeze "that do not raise a novel or compelling public interest ground for waiver in a particular unique situation." Here, Family has failed to provide any such justification for a grant of its waiver request. In view of the three existing full-service television stations currently providing service, the Fort Myers area cannot be characterized as underserved. Moreover, Family has not alleged, nor can we perceive, and public interest benefit to be derived from treating applications for translators filed by existing licensees different than those filed by any other applicants in the implementation of the Commission's freeze policy. In view of the increasing vitality of the UHF service generally, as noted in our low power *Report and Order*, we are not persuaded that Family's status as an existing UHF licensee constitutes a ground for which a waiver can be granted. We anticipate that the other alleged benefits that Family alludes to, in the event its application were granted, would be substantially the same as those that could be provided by other would-be Tier II and Tier III applicants also affected by our freeze.

6. Our tiered processing system is not designed to foreclose applications for Tier II and III areas, but to facilitate the expeditious authorization of local outlets to the nation's most rural and underserved areas first and, then, less rural areas in later stages. The reason for imposing our April 1981 freeze on the acceptance of low power applications was to establish an orderly and effective procedure for the processing of the unanticipated large volume of applications. Since that time, we estimate that an additional 7,000 applications have been filed under our existing freeze exemptions. In view of the steady influx of Tier I low power applications and the commensurate burdens imposed on our staff, we believe it is in the public interest to continue to maintain a freeze on the acceptance of low power applications. Therefore, we believe that Family has failed to justify a waiver of the Commission's freeze on the filing of translator and low power television applications. Accordingly, we find that the Bureau's dismissal of the Family application was proper and we hereby affirm that action.

7. Accordingly, IT IS ORDERED That the request for waiver of the Commission's freeze on the acceptance of translator and low power applications filed by Family Television Corporation, Inc. IS DENIED.

8. IT IS FURTHER ORDERED That its application for review of

the Mass Media Bureau's action returning its application IS DENIED.

9. IT IS FURTHER ORDERED That the Mass Media Bureau send a copy of this Memorandum Opinion and Order by Certified Mail- Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Contour Overlap
Field Intensity, Contour Measurement,
Measurement, Reliability or Accuracy of

Review Board grants summary decision on prohibited contour overlap issue, involving Section 73.37(a) of the Rules, and denies application for new AM station. Joint field intensity measurements demonstrated overlap, which was confirmed by data averaging methodology used to evaluate all available sets of data except certain highly suspect data.
–GSM Media Corporation
BC Docket 81–606

FCC 83R–64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of GSM MEDIA CORPORATION Ontario, Ohio For Construction Permit	BC Docket No. 81–606 File No. BP-20,202

Appearances

Richard Hildreth, *Vincent J. Curtis, Jr.*, and *Dan J. Alpert*, on behalf of GSM Media Corporation; *Lauren A. Colby*, on behalf of Greater Mansfield Broadcasting Company; and *Charles E. Dziedzic*, *Brian P. Kilbane*, and *Lawrence Bernstein*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: August 30, 1983; Released: September 6, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. Review Board involvement in this proceeding began with Memorandum Opinion and Order, 53 RR 2d 1207, released April 22, 1983,[1] in which we ordered GSM Media Corporation (GSM) and Greater Mansfield Broadcasting Company (GMBC) to take joint field engineering measurements to locate certain pertinent AM signal contours. GSM is an applicant for authority to construct a new AM

[1] *Recon. dismissed*, FCC 83R-34, released May 5, 1983.

station at Ontario, Ohio, and GMBC is the licensee of Stations WCLW and WCLW-FM, Mansfield, Ohio, and a petitioner to deny GSM's application.

2. GMBC has steadfastly maintained since March 1977, when it filed its petition to deny, that GSM's proposed 0.5 mV/m contour would overlap with the 0.025 mV/m contour of AM Station WPGW, Portland, Indiana, in violation of Section 73.37(a) of the Commission's Rules, 47 CFR 73.37(a), and GSM's application was originally designated for hearing on that issue, among others, by Memorandum Opinion and Order, Mimeo No. 003113, 46 Fed. Reg. 45188, published September 10, 1981. Prior to commencement of that hearing, Administrative Law Judge James F. Tierney (ALJ) issued a Summary Decision (S.D.) granting GSM's application upon a finding that the pleadings before him left no genuine issue of material fact for determination at hearing. FCC 82D-78, released December 15, 1982. We ordered joint field measurements to be taken because GMBC's exceptions to the S.D. and the reply briefs of GSM and the Mass Media Bureau made it abundantly clear that valid engineering measurements were critical to a reasoned analysis and decision in this case, and almost all of the measurements already in the record were disputed either as unusually distorted by seasonality or as invalid because of improper locations or techniques. 53 RR 2d at 1209.

3. The joint measurements were taken on May 31, June 1, and June 2, 1983, and, according to GMBC's Report, filed July 6, 1983, at 2, "There were no disagreements and the measurement data is undisputed." We also have before us comments and reply comments by GSM, GMBC, and the Bureau related to these measurements; GMBC's original exceptions and the reply briefs of GSM and the Bureau; and a petition to enlarge issues filed by GMBC on July 7, 1983, and responsive pleadings. The Board has reviewed the S.D. in light of these documents, the oral argument held March 25, 1983, and our examination of the record. We adopt the findings of fact in the S.D., except as modified herein, but reverse the ALJ's ultimate conclusion and hold that summary decision on the contour overlap issue should be granted in GMBC's favor and that the public interest, convenience and necessity therefore requires that GSM's application be denied.

4. GMBC's original exceptions focused solely on the overlap issue. GMBC contended that summary decision was inappropriate because there were sharp differences in the relevant engineering data and the expert affidavits interpreting that data, which could not be resolved without an evidentiary hearing. In response, GSM and the Bureau essentially argued that no engineering "facts" were in dispute, only the proper analysis of those facts, and that disagreements among experts do not necessarily require elaboration at hearing where, as here, experts have already had an opportunity

to express their opinions (with supporting documentation) in writing and there is no candor issue requiring demeanor findings. Moreover, according to GSM and the Bureau, the Commission approved a data averaging methodology in *United Broadcasting Co., Inc.*, 1 FCC 2d 555, 559, 5 RR 2d 684, 689 (1965), as a means of analyzing conflicting data without the need for a hearing, and the ALJ used data averaging in this proceeding to conclude that there was no prohibited contour overlap. While GMBC agreed in principal with the concept of averaging, it maintained that the alleged averaging of valid data with invalid data in the instant case was unscientific, contrary to the Commission's rules, and should not be permitted. According to GMBC, if only valid data (its own) were averaged, that data would show a prohibited contour overlap. In their July 1983 joint measurement submissions, GSM and the Bureau continue to urge use of data averaging—averaging the 1983 data with the previous data—but GMBC opposes such averaging, still taking issue with the validity of certain previous data and now additionally arguing that averaging even valid data taken under different testing circumstances and along different testing radials is not appropriate.

5. The essential question before us is what weight should be given to the eight years of engineering data and analyses in this record and whether either the data or the analyses leave any "genuine issue of material fact" that must be resolved in the crucible of an evidentiary hearing. Section 1.251(a)(1) of the Rules, 47 CFR 1.251(a)(1). The data may be summarized, as follow:

Distance Chart

Measurement Date/Source	*Distance to Contours*		*Total*
	0.025 mV/m	*0.5mV/m*	*Distance*
A. December 1975/GSM	109.0	10.2 *	119.2 miles
B. July 1978/GSM	106.0	10.2	116.2
C. January 1977/GMBC	122.0	10.2 *	132.2
D. July 1978/GMBC	117.5	10.2	127.7
E. July 1978/GMBC	115.3	10.2	125.5
F. May-June 1983/GMBC**	123.0/124.49***	7.8	130.8/132.29
May-June 1983/GSM**	122.0	6.9	128.9

* Contour measured by GSM in 1975 and by GMBC in 1982

** GMBC and GSM provided different analyses of identical May-June 1983 data.

*** GMBC provided alternative analyses in its July 6 and 21, 1983 pleadings.

The parties agree that the total distance between Station WPGW's transmitter site and GSM's proposed site is 128.2 miles. Thus, if the "Total Distance" of the 0.025 mV/m and 0.5 mV/m contours exceeds that figure, the contours will overlap. It is clear from the above chart that, without data averaging, the data on lines C and F indicate contour overlap, while the data on lines A, B, D, and E do not.

6. For data averaging purposes, various combinations of data have been used (or considered) by the parties in this proceeding. These combinations may also be summarized, as follows:

Distance Data Combination	Averaging Chart Source	Total Distance (Averaged)
(1) D, E *	GSM Motion for Summary Decision; adopted in S.D.	126.2 miles
(2) C, D, E	GMBC Exceptions	128.46
(3) A, C, E	GSM Reply to Exceptions	125.3
or A, C, D, E	GSM Reply to Exceptions	125.9
(4) F **	GMBC July 1983 Reply	130.8/132.29
(5) A, C, E, F	GSM July 1983 Comments	126.175
or A, C, D, E, F	GSM July 1983 Comments	126.26
(6) C, E, F	Combination (5) without A	128.86
or C, D, E, F	Combination (5) without A	128.3

* Letters correspond to lines in Distance Chart, supra.
** In its july 21, 1983 Reply, GMBC argues that the F data represent an average in themselves.

This chart indicates that, if data averaging is used, data combinations (2), (4), and (6) show contour overlap, while combinations (1), (3), and (5) do not. In their July 1983 pleadings, GSM endorses combination (5), GMBC urges combination (4), and the Bureau favors "averaging all available measurement data" (Bur. July 21, 1983 Comments, at 2) and "continues to believe that no overlap occurs," (*id.*), but does not specifically proffer a total distance figure.[2] [3]

7. When it ordered the May-June 1983 joint field measurements to be taken, the Board did not decide whether the measurements should augment or supplant the existing engineering evidence. Order, FCC 83R-34, released May 5, 1983, para. 2. We were hoping that the joint engineering effort would alleviate some of the methodology disputes with which the previous data were rife and would, at the same time, corroborate some of the existing data. We were not disappointed. We again acknowledge, with approbation, that these joint measurements, unlike the "concurrent" measurements of July 1978, were carried out in a most professional way, without petty disagreements and disputes. See paragraph 3, *supra*. However, as line F of the Distance Chart, *supra*, attests, even when there are no disputes about the raw data, experts may well differ in analyzing that data. Nevertheless, all parties—GSM, GMBC, and the Bureau—concede that no matter whose analytical expertise is used, the May-June 1983 data show prohibited contour overlap of any-

[2] None of the data combinations includes line B, because GMBC vehemently opposes its use and GSM stated in its July 6, 1983 Comments (at 4) that it "would not oppose" disregarding that data. If it were used, it would yield a figure less than the 126.26 miles average of combination (5).

[3] It should be noted that, with the exception of combination (1), these averages are essentially simple arithmetic averages. The Board's reading of *United Broadcasting Co.*, *supra*, suggests that plotting all field intensity data on a single graph and drawing composite contours is analytically preferable, if not mandatory, and GSM and GMBC acknowledged that method's superiority at oral argument. Tr. 80, 101. However, GSM believes that the difference between the two methods in this case is "very minimal" (Tr. 101) and has not objected to use of the simple arithmetic method adopting it itself in combinations (3) and (5). In future cases we expect all parties to heed *United's* guidelines strictly in order to ensure the most accurate averaging results.

where from 0.7 miles (GSM) to 4.09 miles (GMBC). See Distance Chart, *supra*, at line F (*e.g.*, 128.9 miles minus 128.2 = 0.7 miles of overlap).[4]

8. It would be simple enough to curtail the data analysis at this point, toss out all of the 1975–1978 engineering measurements as flawed, and reach a decision based on the 1983 data alone. After all, the latest data is relatively clearcut, the methodology is undisputed, and the information may be said to accurately reflect technical conditions at the present time—when a grant or denial of operating authority is imminent, not five or eight years ago. And such a curtailment would probably be legally permissible under the circumstances of this case. However, we are abundantly aware that conflicting engineering data is not novel at this agency, and that *United Broadcasting Co.*, *supra*, provides a powerful analytical tool for reconciling some of these conflicts without resort to either evidentiary hearing or the ax. Indeed, the prime justification for *United's* data averaging methodology is to minimize the impact of analytical "bias or error". 1 FCC 2d at 558, 5 RR 2d at 689. However, the data disparities evident in the Distance Chart, *supra*, and other evidence to be discussed *infra*, beg the question voiced by GMBC at oral argument (Tr. 97): "How much bias [or error] can you tolerate [when data averaging] before you throw the data out?" Thus, while we feel obliged by *United* to at least consider the results of data averaging in the instant case, we do not accept the Bureau's interpretation of *United* (see paragraph 6, *supra*) that "all" data may properly be averaged, regardless of its demonstrated defects. Rather, the use of data averaging must be tempered by the command in Section 73.153 of the Rules, 47 CFR 73.153, that field strength measurements will only take precedence over theoretical engineering values if such measurements are "properly taken and presented". In other words, there *are* limits to the data short-comings that may be overlooked in the *United* data averaging process.

9. With this caveat in mind, we turn to GMBC's repeated and

[4] We pass over GSM's quasi-exception (July 6, 1983 Comments at note 1) concerning the propriety of our ordering these measurements and reopening the record to receive the data and related pleadings. We took this step under our plenary authority to ensure that a full record on a critical issue was secured prior to final decision, Section 0.365(a) of the Rules, 47 CFR 0.365(a), and our action was not unprecedented. *See Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 25 RR 2d 135 (Rev. Bd.), *aff'd*, 37 FCC 2d 583, 25 RR 2d 595 (1972); *cf. Brown Broadcasting Co., Inc.*, 12 FCC 2d 189, 12 RR 2d 826 (1968) (Commission orders submission of supplemental information so that determination of whether a substantial question of fact exists may be based on a complete showing). *Bunker Ramo Corp.*, 31 FCC 2d 449, 22 RR 2d 843 (Rev. Bd. 1971), where the Board declined to direct a hearing examiner to take certain evidence as an impermissible incursion on his prerogatives to control the course of a hearing, is readily distinguishable because here the presiding officer had already terminated his role in this proceeding and we were merely requiring supplemental evidence, under unusual circumstances, to aid reasoned appellate review.

shrill attacks on the validity and credibility of GSM's December 1975 field measurements (line A of the Distance Chart, *supra*). These measurements were taken by Gunther Meisse (president and 80% shareholder of GSM) and Harry James Hire (president and shareholder of Johnny Appleseed Broadcasting Company, which owns the remaining 20% of GSM's stock) and were filed as part of GSM's instant application. On October 19, 1981, GMBC took the depositions of Messrs. Meisse and Hire, which disclosed, *inter alia*, that: Meisse is not an electrical engineer, has never taken an electronics course, has read some electronics books but "not . . . extensively," and is not an electronics expert (M. Dep. 5); the December 1975 measurements were Meisse's and Hire's first such endeavor (M. Dep.6; H. Dep. 25); Hire has an electrical engineering degree, but Hire and Meisse took the measurements under the directions of a different engineer, Mr. Serge Bergen, who was not present but gave "some written instructions. However, most of it was handled by phone" (H. Dep. 19; M.Dep. 6); and both Hire and Meisse had only a vague recollection of the instructions they received and had not retained their notes (H. Dep. 26, 47; M. Dep. 9, 18). In its exceptions, GMBC uses these findings to challenge the testing credentials of Meisse and Hire and the reliability of their measurement data. It also uses other deposition statements to cast doubt on the propriety of their measurement techniques and equipment, especially during their July 1978 field measurements. Finally, GMBC notes that the December 1975 (and July 1978) GSM measurements "differ radically" from the "norm" of all of the other measurement data in this proceeding. GMBC Exceptions, at 11.

10. GMBC addressed similar concerns to the ALJ in the context of a motion to enlarge issues, which was denied by Memorandum Opinion and Order, FCC 82M-0133, released January 18, 1982. The ALJ gave short shrift to GMBC's technical arguments as "of little consequence" and fraught with speculation and surmise, and held that the Commission's rules do not specify the qualifications of measurement takers and that Meisse and Hire "can hardly be faulted" for imperfect memories concerning measurements that were taken six years before their depositions. *Id.*, para. 3. Our view is somewhat different. Although the Commission's rules do not specify the qualifications of measurement takers, we believe that especially where, as here, precise engineering measurements lie at the heart of a licensing decision, the Commission has a right to expect (and a duty to demand) that those measurements will not be taken by rank amateurs. This proceeding was clearly not the proper setting for the kind of unsupervised, novice efforts that GSM sponsored in December 1975. And while the data disparities noted by GMBC (see Distance Chart, *supra*) are only circumstantial evidence of substantial measurement errors, we conclude that these marked disparities, which have not been adequately explained, and the below-par testing

credentials of Meisse and Hire place GSM's December 1975 field measurements beyond the protection of *United's* "error" averaging umbrella and require that measurement data to be excluded from evidentiary consideration here. In reaching this conclusion, we do not address GMBC's contention that the December 1975 measurements were fraudulent. It is sufficient for us to decide that enough doubt has been cast on the accuracy of the data to warrant its exclusion from data averaging under *United*. See paragraph 8, *supra*.[5]

11. Turning again to the Averaging Chart, *supra*, we see that if GSM's December 1975 measurements (line A) are discarded, we are left with data combination 6 as the only sets of measurement data which fully comport with *United*. Those data averages show a prohibited contour overlap of either 0.1 or 0.66 miles, depending on which of GSM's data combinations is used. Thus, *United's* data averaging methodology confirms the unanimous conclusion of the May-June 1983 measurements—that GSM's proposed station would create prohibited contour overlap with Station WPGW. See paragraph 7, *supra*. Anticipating in its July 6, 1983 Comments, at 6, that the Board might reach this conclusion, GSM baldly requests that "the *de minimis* nature of any overlap . . . be considered [and] that the Board find such overlap to be insignificant and waive the appropriate rules." While the Board recognizes that the prohibited contour overlap in this case is slight, the Commission rule at issue—Section 73.37(a), 47 CFR 73.37(a)—is a go-no go rule. *See Assignment Standards -AM and FM*, 45 FCC 1515, 2 RR 2d 1658 (1964). As such, it has been rarely waived by the Commission—after extensive showings of "unique and compelling circumstances," *B & K Broadcasting Co.*, 2 FCC 2d 21, 6 RR 2d 687 (1965)—and waiver has been consistently denied, absent "extraordinary circumstances," *Valley Radio Corp.*, 52 RR 2d 1641, 1642 (1983). Because GSM has failed to provide any justification whatsoever for such extraordinary action (other than to call the prohibited overlap *de minimis*), its waiver request must, perforce, be refused. *Cf. WAIT Radio* v. *FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

12. At this juncture, GSM might wish to disown its view (see paragraph 4, *supra*) that summary decision on the present record is appropriate and that further proceedings are unnecessary. However, GSM is correct that the mere existence of conflicting expert opinions does not mandate a hearing, unless there are disputed genuine issues of material fact. *See Tele-Media Corporation* v. *FCC*, 697 F.2d 402, 409 (D.C. Cir. 1983); *Chuck Stone* v. *FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972). The preceding analysis demonstrates that no such issues exist.

[5] For similar reasons, the Board would also exclude GSM's July 1978 measurements (line B of Distance Chart, *supra*), but for the fact that GSM has already voluntarily abandoned them. See note 2, *supra*.

It is in the nature of field intensity measurements that no two sets of measurements will be identical. *See United Broadcasting Co., Inc., supra.* Where, as here, joint field measurements are taken with similar interpretative results and these results are confirmed by *United's* data averaging technique (excluding highly suspect data), no further exploration of minor differing viewpoints is called for. The controversy over GSM's December 1975 field measurements does not require a different result. Those measurements have been excluded largely because of deposition testimony by GSM's own principals. The deposition sessions were exhaustive and GSM counsel was present and had the opportunity to clarify or amplify Meisse's and Hire's testimony through "cross-examination" but saw no need (one unrelated question asked at Hire's deposition, H. Dep. 61; no questions asked at Meisse's deposition, M. Dep. 78). Having previously relied on the passage of time as an excuse for "imperfect memories," *see* FCC 82M-0133, *supra*, it is difficult to comprehend how GSM might now maintain (which it does *not*) that a hearing two years later than the depositions would further elucidate matters or lead to a different result. Hence, we conclude that summary decision is appropriate on the record as it presently exists, *cf. Tele-Media Corporation* v. *FCC*, *supra*, at 409, and that it must be granted in GMBC's favor on the contour overlap issue. This disposition, in turn, mandates the denial of GSM's application.

13. One final matter. On July 7, 1983, GMBC filed a petition to enlarge issues in which it alleges that, based on GMBC's May-June 1983 test site measurements, GSM's 5 mV/m proposed contour does not encompass all of the residential areas of Ontario, Ohio, in violation of Section 73.24(j) of the Rules, 47 CFR 73.24(j). GSM opposes the issue, arguing that the area and population excluded are *de minimis* (no more than 0.24 square miles out of 9.59 and no more than 19 persons out of a total population of 4,123), the area is essentially rural in nature, an adequate signal will nevertheless be provided throughout the community, and that, therefore, a finding of substantial compliance with Section 73.24(j), or waiver of the rule, is warranted. The Bureau states that a proposal falling short of absolute compliance with Section 73.24(j) may be granted without a waiver of the rules, where "substantial compliance" with the 5 mV/m coverage requirement is shown, citing *H-B-K Enterprises*, 15 FCC 2d 683, 685–686 (Rev. Bd. 1968).[6] We conclude that GSM's showing meets the substantial compliance test of *H-B-K*, and GMBC's petition will therefore be denied.

14. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues filed by Greater Mansfield Broadcasting Company on July 7, 1983 IS DENIED; that the petition for leave to submit

[6] Disputes under Section 73.24(j) thus differ significantly from those under Section 73.37(a). See paragraph 11, *supra.*

responsive affidavit filed by Greater Mansfield Broadcasting Company on August 3, 1983, IS GRANTED; and that page 2 of a letter from Greater Mansfield Broadcasting Company to Review Board staff, dated August 18, 1983, IS STRICKEN.

15. IT IS FURTHER ORDERED, That the application of GSM Media Corporation (File No. BP-20,202) for authority to construct a new AM station at Ontario, Ohio, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 82D–78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of GSM MEDIA CORPORATION Ontario, Ohio For Construction Permit	BC Docket No. 81–606 File No. 20,202

Appearances

Vincent J. Curtis, Jr., Esq., on behalf of GSM Media Corporation; *Lauren A. Colby, Esq.*, on behalf of Greater Mansfield Broadcasting Company; and *Brian P. Kilbane, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued: December 8, 1982; Released: December 15, 1982)

Preliminary Statement

1. On September 14, 1982, GSM Media Corporation (GSM) filed a Motion for Summary Decision. GSM filed, September 20, 1982, an Addendum forwarding an affidavit of its President. Greater Mansfield Broadcasting Company (Greater Mansfield), petitioner to deny, filed an Opposition on October 28, 1982. The Chief, Broadcast Bureau (Bureau) filed "Comments" in support on October 29, 1982. The Bureau filed, November 1, 1982, a Supplement concerning a supporting affidavit. Greater Mansfield filed a Motion for Leave to File Reply on November 8, 1982. GSM opposed that Motion on November 10, 1982, and Greater Mansfield filed its Reply on the same date. The Bureau filed, November 18, 1982, an Opposition to Motion for Leave to File Reply.

2. In the Designation Order, *Memorandum Opinion and Order*, 46 Fed. Reg. 45188, published September 10, 1981, the following issues were specified:

1. To determine whether the proposed operation would cause contour overlap with station WPGW, Portland, Indiana, in violation of Section 73.37(a) of the Commission's Rules.

2. To determine whether the proposed antenna system can be adjusted and maintained within the proposed limits of radiation.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether grant of the application would serve the public interest, convenience, and necessity.

Findings of Fact

3. GSM urges that the issues specified in this proceeding are solely of a technical nature seeking to determine in the first instance whether there would be overlap of the 0.025 mV/m contour of station WPGW, Portland, Indiana, and the proposed 0.5 mV/m contour of GSM and secondly, whether the antenna system proposed is capable of adjustment and maintenance during operations. As purely technical issues, states GSM, the questions presented are ideally suited for action by summary decision. Here the technical facts have been established and what remains is the technical analysis of those facts and the legal conclusions to be drawn therefrom. GSM sets forth in an affidavit of Harold L. Kassens, GSM's consulting engineer, an analysis of the data available which, in its view, clearly warrants findings on both technical issues in the favor of GSM and a grant of its application.

Issue 1

A. *WPGW's 0.025 mV/m Contour*

4. Continuing its argument, GSM states, "At this time, there are four separate sets of measurements which seek to establish where the .025 mV/m contour of station WPGW, Portland, Indiana lies.[1] The first of these measurements were conducted by GSM and were filed with its original application in 1975. These showed the contour falling at 108 miles.

5. "The second set of measurements were conducted on December 31, 1976 and January 1, 1977 by [a Mr. Ball] one of the engineer's for Greater Mansfield Broadcasting Company, the licensee of stations WCLW and WCLW-FM, Mansfield, Ohio, and filed as part of a Petition to Deny the GSM Media application. That set of measurements showed a considerable difference between GSM Media's measurements and extended the WPGW contour beyond the proposed GSM Media site.

6. "The third and fourth sets of measurements resulted from a letter sent to GSM Media and WCLW in January, 1978 by the Chief, Broadcast Bureau requesting the parties to take joint measurements. Because of considerable antagonism that had developed, the parties could not agree on 'joint' measurements but did conduct what has been labeled as 'concurrent' measurements on July 18–20, 1978. These measurements, together with separate analysis were submitted by WCLW's consulting engineer, Harold Munn, and GSM Media's then consultant, Serge Bergen. Bergen's analysis of his own (GSM Media's) set of measurements finds the WPGW contour at 106 miles. (Kassens affidavit at p. 4). Munn submitted an analysis of both

[1] It has been calculated that a distance of 128.2 miles separates WPGW and GSM's proposed site. (Kassens affidavit at p. 10.)

GSM Media's measurements and his own (WCLW's) measurements. Munn found that the GSM Media measurements should be analyzed to show a distance of 117.5 miles for the WPGW contour.[2] Surprisingly, Munn's analysis of *his own* measurements shows the WPGW .025 mV/m contour at 115.3 miles or 1.7 miles *less* than his analysis of GSM Media's measurements. (Kassens affidavit at pp. 4–5)."

7. Further, GSM urges that it is well recognized that when field measurements are submitted to the Commission they are to take precedent over predicted calculations. The major caveat is that the field measurements are valid. Under the situation at hand, as explained by Mr. Kassens, both the original measurements by GSM and Mr. Ball's December 31, 1976, and January 1, 1977, measurements failed to indicate that concurrent readings of the directional antenna of WPGW were made. (Kassens affidavit at p. 7.) Also, the Ball measurements were totally out of sync with the other three sets of measurements—including WCLW's "concurrent" measurements. Since all four sets of measurements show an inverse distance field at one mile of 195 mV/m (the proof of performance value for WPGW)[3] and all four were made to a distance of approximately 117.5 miles, the Ball results appear to reflect that some major deviation from the norm was involved. Thus, it is submitted that the only two sets of measurements that remain to be "analyzed" are the "concurrent" July 1978 measurements.

8. As reflected above, and as set forth in Mr. Kassens' affidavit, he has "averaged" the "concurrent" measurements, using both the GSM and WCLW measurement data, and analyzed the WPGW contour to fall at 116 miles. (Kassens affidavit at p. 8.) This "average" would be above *Munn's own analysis of his own (WCLW's) set of measurement of 115.3 miles.*[4] [5]

B. *The GSM 0.5 mV/m Contour*

9. With its application, GSM submitted the results of a field test survey of GSM's proposed 0.5 mV/m contour from its proposed site. Utilizing this data[6], Mr. Kassens has analyzed the data and

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[2] Munn and WCLW's counsel both have argued that the GSM measurements were not validly conducted and should be rejected.

[3] Previously, Munn has complained that his measurements were distorted because of the WPGW operation.

[4] Thus, if one were to accept WCLW's earlier argument that the GSM "concurrent" measurements were also to be rejected as invalid and were left with only WCLW's own measurements, the WPGW contour would fall at the 115.3 mile point, some 0.7 miles less than the average.

[5] Mr. Kassens also deals with and explains away the "stub" measurements conducted by Ball *after* the "concurrent" measurements were made (Kassens affidavit at pp. 8–9). These *additional* measurements, in addition to being contrary to the technical standards were also contrary to the Commission's January 1978 letter seeking to terminate the pleading war involved.

[6] WCLW has on three previous occasions attempted to discredit this data and on

concluded that the proposed 0.5 mV/m contour of GSM will fall at a distance of 10.2 miles. (Kassens affidavit at p. 10.)

C. *Separation between Contours*

10. Recognizing that the calculated distance between the WPGW site and the GSM proposed site is 128.2 miles (Kassens affidavit at p. 10), GSM continues its argument that if we took the analyzed distance of the GSM 0.5 mV/m contour at 10.2 miles and the WPGW 0.025 mV/m contour at an "averaged" distance of 116 miles, it is evident that *a two mile* separation occurs. Even omitting averaging and accepting *only* WCLW's *own* "concurrent" measurements and Munn's *own* analyses, the contour would fall at 115.3 miles or 2.7 miles separation.[7] Therefore, GSM states, whichever is accepted GSM or WCLW alone or both averaged, even using WCLW's own analysis, an adequate separation exists and the first issue must be found in favor of the applicant.

Issue Two

A. *Stability*

11. The affidavit of Mr. Kassens provides a complete answer to the questions facing the Chief, Broadcast Bureau at the time of designation. Not only does Mr. Kassens' statement confirm that the array would be stable but also GSM has agreed to take certain steps to ensure that proper variations will be maintained.[8]

B. *Suitability*

12. In their various pleadings, WCLW has previously raised questions concerning the suitability of the proposed site and the effect thereof on the directional operation. Again, Mr. Kassens' affidavit (pp. 17–21) demonstrates the problems alleged by WCLW can be readily overcome—should they actually arise—by usual procedures normally followed in like situations. In short, there is nothing that WCLW has raised that has not been routinely handled by many Commission licensees in the past.[9]

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each occasion its contention has been rejected. See *Memorandum Opinion and Order, supra*, at para. 5. *Memorandum Opinion and Order*, FCC 82M-0133, released January 18, 1982; *Order*, FCC 82M-2400, released August 5, 1982.

[7] If one took *only* the GSM measurements and *only* accepted Munn's analysis, the separation would be 0.5 miles.

[8] See also affidavit of Gunther S. Meisse, GSM's President, confirming that the statements made by Mr. Kassens relating to the proposed array and site would be complied with. (Also, Kassens affidavit at pp. 16–17.)

[9] Meisse's affidavit confirms the willingness of GSM to take the steps necessary to meet problems should they arise.

C. *Proposal will Comply with Commission Requirements*

13. It is evident from Mr. Kassens' discussion that the averaging proposal can be adjusted and maintained.

14. GSM concludes that, the technical issues specified having been shown to require action favorable to GSM, summary decision should be granted allowing the application of GSM to be granted.

15. Greater Mansfield's opposition suggests that the GSM motion does not resolve the many conflicts of fact which remain. Stating that there is a clear conflict of engineering opinion of whether there would be prohibited overlap, Greater Mansfield urges that this conflict can only be resolved by a full evidentiary hearing. Further, Greater Mansfield contends that GSM's motion is predicated on a basic misunderstanding, and that its engineer denies that Greater Mansfield's measurements show that the location of the WPGW "nuisance contour" is closer to WPGW than would be shown by the GSM measurements. Also that GSM has failed to utilize valid measurement data, which must be taken into account. Among other reasons, Greater Mansfield states that where many "crucial" facts are in sharp dispute, summary decision would be wholly inappropriate.

16. In its "Comments," the Bureau notes that GSM maintains that only two sets of measurements are valid, and that GSM's engineering analysis of an "average" of those two sets establishes that there would be no contour overlap between the GSM 0.5 mV/m contour and the WPGW 0.025 mV/m contour; that analysis of either one of the two sets, without averaging, shows that there will be an adequate separation of contours. Supporting GSM's motion, the Bureau says that its engineering staff conducted an analysis "of all sets of field measurements." That the Commission requires that an engineering analysis "use an average effective conductivity determined from all available data. . . ." citing *United Broadcasting Company, Inc.*, 1 FCC 2d 555, 559 (1965), which the Bureau says it has done. Based on that analysis, the Bureau concludes with GSM that there would be no prohibited contour overlap between WPGW and GSM's proposed contour. That being so, the Bureau continues, there being no genuine issue of material fact, the overlap issue should be resolved in GSM's favor. Also, the Bureau urges that the issue concerning the maintenance of GSM's proposed antenna system should likewise be resolved in GSM's favor, in that GSM has established that its antenna system can be adjusted and maintained within the proposed limits of variation. The Bureau's position is enhanced by an appropriate verified affidavit of its engineer.

17. Respecting Greater Mansfield's uncommon Motion for Leave to File Reply, premised on its notion of a further "kick at the can," in the main, because of the Bureau's "supporting comments," suffice to say, that the "can" has been more than liberally kicked, almost to

the point of annihilation, if one but recalls the several grants of time extensions to the parties here, not to mention Greater Mansfield's granted extension of October 15, 1982, beyond its earlier profession of needing not more than "a flat period of 30 days" granted by *Order*, FCC 82M-2941, released September 23, 1982. But beyond this observation, GSM's opposition of November 10, 1982, states the proposition well—that the Bureau's analysis is not "new evidence" but simply an analysis of factual data before this agency—hence, GSM's argument[10] is persuasive and is adopted. Thus, Greater Mansfield's Motion for Leave must be AND IS HEREBY DENIED; accordingly, its proffered Reply filed November 10, 1982, IS REJECTED, as unauthorized.

Conclusion

18. Greater Mansfield would have it that, and otherwise correctly so, "Summary Decision should be granted only where the truth is clear, where the basic facts are undisputed, and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 32 RR 1119 (Rev. Bd. 1975). Its position, however, after review of all available factual submissions, is fatally flawed. This, not "because the Broadcast Bureau recommends such action" (as Greater Mansfield would have it); rather, it is the clear persuasiveness of the Bureau's analysis comprehending "[a]ll of the FIM [field intensity measurements] taken both by GSM and GMBC [Greater Mansfield]" and its consequent conclusion that "GSM's proposed 0.5 mV/m and WPGW's 0.025 mV/m criteria do not overlap." GSM's position is equally convincing. Though it very well may be that there are conflicting *views* or *opinions*, *vis a vis* the respective adversary engineers, this does not amount to nor equate with the sole and compelling rational inference from the facts presented that a genuine issue of material fact remains to be determined. Not only are the analyses of the factual data in dispute made by the Bureau convincing, they are soundly supported in apposite precedent, *infra*. Thus, taking into account the various provisions permissive of Summary Decision in Rule 1.251, as well as abiding precedent—*United Broadcasting Company, Inc.*, *supra*, and rendering the close scrutiny of Movants' papers with a full consideration of Greater Mansfield's prayer concerning the need for cross-examination, it is concluded that no genuine issue of material fact remains for determination at hearing respecting the given issues at bar.

[10] GSM Media also alludes to the notion that what Greater Mansfield has been pursuing throughout this proceeding by its pleading tactics "is seeking for straws to keep its battle against new competition alive." That question, even were it true, need not be reached.

That being so, GSM Media Corporation's Motion for Summary Decision may be AND IS HEREBY GRANTED[11]; thus the outstanding issues in this proceeding ARE RESOLVED favorably to GSM Media Corporation.

Accordingly, the application of GSM Media Corporation for the captioned facilities at Ontario, Ohio, may be AND IS HEREBY GRANTED, with the following *caveat* (as stated in the Designation Order, *Memorandum Opinion and Order, supra*):

> An antenna monitor of sufficient accuracy and repeatability, and having a minimum resolution of 0.1 degree phase deviation and 0.1 percent sample current deviation, shall be installed and continuously available to indicate the relative phase and magnitude of the sample currents of each element in the array, to insure maintenance of the radiated fields within the authorized values of radiation.
>
> Upon receipt of operating specifications and before issuance of a license, permittee shall submit the results of observations made daily of the base currents and their ratios, relative phases, sample currents and their ratios, and sample current ratio deviations for each element of the array, along with the final amplifier plate voltage and current, the common point current, and field strengths of each monitoring point for both nondirectional and directional operations for a period of at least 30 days, to demonstrate that the array will be maintained within the specified tolerances.
>
> If the Commission ultimately adopts a rule prohibiting commonly owned AM and FM stations in the same market, permittee will divest itself of its AM station or sever its relationship with WVNO(FM), Mansfield, Ohio, in accordance with the requirements established in such rulemaking proceeding.

Nothing further remaining, this proceeding IS TERMINATED. IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION
JAMES F. TIERNEY, *Administrative Law Judge*

[11] Under Rule 1.257, this, as a Summary Decision, is to be accorded similar appellate disposition as with an Initial Decision under Rule 1.276. Thus, in the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release.

Reconsideration, Petition for, Denial of
Satellite, Earth Station, Facilities

Petition for reconsideration of *GTE Satellite Corp.*, 90 FCC 2d 1009 (1982), denied, and related application of GSAT for authority to construct and operate earth station granted. Action affirms underlying decision without restricking, telecommunications services to consumers.
–GTE Satellite Corp.

FCC 83–271

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of GTE SATELLITE CORPORATION For authority pursuant to Section 214 of the Communications Act of 1934, to lease and operate transponder capacity from Telesat Canada for the provision of communication common carrier services within the contiguous United States, and GTE SATELLITE CORPORATION For authority to construct and operate a $^{14}/_{12}$ GHz transmit/receive Telemetry, Tracking and Command (TT&C) earth station at Terre Haute, Indiana.	File No. W-P-C-4355 File No. 000179-DSE-P/L-83

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted June 2, 1983 Released June 23, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it a petition for reconsideration of *GTE Satellite Corporation*, 90 FCC 2d 1009 (1982) (hereinafter referred to as *Order*) and a related application of GTE Satellite Corporation (GSAT) for authority to construct and operate a $^{14}/_{12}$ GHz transmit/receive TT&C earth station. The petition was filed

pursuant to Section 1.106 of the Commission's rules (47 C.F.R. § 1.106) by United States Satellite Broadcasting Company, Inc. (USSB). Comments generally supporting USSB's petition were filed by Satellite Business Systems (SBS) and Satellite Television Corporation (STC). GSAT and United Satellite Television (USTV)[1] oppose the petition, and also have filed motions to strike the comments of SBS and STC. We also have received a Petition to Accept Late Filed Pleading and Comments of SPACE, the Society for Private and Commercial Earth Stations, generally supporting the grant of GSAT's application and denial of reconsideration.[2] USSB also has filed a petition to deny GSAT's TT&C application, to which GSAT and USTV have responded.[3]

Background

2. On February 17, 1982, the Commission received an application from GSAT requesting authority to lease 10 transponders on Telesat Canada's ANIK-C satellite to provide communication common carrier services. Public notice of this application was made on March 3, 1982. No comments were received. On June 18, 1982, the Commission received a letter from USTV explaining its proposed use of the GSAT facilities and requesting expeditious action on the GSAT application.[4] On August 5, 1982, the Commission granted the GSAT application.

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[1] United Satellite Communications, Inc. is the new corporate name of United Satellite Television. However, for the purpose of consistency we will continue to refer to the entity as USTV.

[2] Additional pleadings were filed in this matter after GSAT informed the Commission of a change in circumstance. See paragraphs 26–29, *infra*. In total, more than 30 pleadings have been filed in this proceeding, of varying procedural regularity. We have considered (but not separately stated) the arguments of all the parties because doing so has not delayed this proceeding, has permitted all interested parties an opportunity to comment, and has provided a fuller record upon which to base our decision. *See* Associated Press, 72 FCC 2d 760, 762–63 (1979); Columbia Broadcasting Systems, Inc., 46 FCC 2d 903, 905–06 (1974).

We reject USSB's petition for oral argument, filed May 27, 1983, in which it requests the Commission to hold oral argument on the question of whether non-licensees (such as USTV) should be subject to certain obligations imposed on broadcasters. In addressing a similar issue previously, we declined to impose these obligations at this time, but stated we may need to apply regulatory constraints on common carrier DBS licensees or their programmer customers "if circumstances arise to suggest they are needed." Direct Broadcast Satellites, 90 FCC 2d 676, 711 (1982). If USSB believes circumstances exist warranting imposition of constraints, they should be raised in a petition for rulemaking instead of an individual proceeding.

[3] Although worded differently, the arguments made by USSB in this petition essentially parallel those raised in its petition for reconsideration and challenge the merits of the underlying proposal of GSAT and USTV. While we have not separately stated all those arguments we have examined and considered them and the responses thereto in our decision.

[4] This information was in a letter to the Chief, Common Carrier Bureau.

3. In the *Order*, we gave GSAT authority to acquire and operate satellite transponder capacity under a lease arrangement with Telesat Canada. GSAT's customer, USTV, was to use GSAT's services to provide video programming to small receiving antennas in the 11.7–12.2 GHz fixed satellite band. According to USTV, its customers would include small cable television systems, hotels, motels, hospitals, low power television stations, STV and MDS stations and multiple and single unit dwellings. Authority was granted until December 31, 1984, by which time GSAT must transfer its services to a United States satellite, presumably GSAT's GSTAR satellite.[5]

4. In the *Order*, we pointed out that USTV's proposal to provide video programming to single unit dwellings raised a question as to the consistency of GSAT's application with the order adopting interim rules for Direct Broadcast Satellite (DBS) service[6] and with the United States' proposal to the World Administrative Radio Conference (WARC) to allocate separate frequency bands to the fixed satellite and the broadcast satellite services.[7] Having raised the issues, we concluded, at footnote 5, that our position at WARC and the order adopting interim rules for DBS were primarily premised on two concerns: (1) "the belief that high quality [DBS] services would require satellites operating at significantly higher powers than existing and proposed fixed satellite systems," and (2) that "the potential interleaving of such satellites of disparate power sharing the same frequency bands would have a detrimental impact on the Commission's ability to make necessary changes in the spacing of evolving communications satellite systems." We pointed out that the WARC did recognize continued sharing by adopting Radio Regulation 836 which provides that the band set aside for fixed satellite services (11.7–12.1 GHz) could be used for broadcasting satellite services but only at restricted power and without causing greater interference or requiring more protection from interference than the coordinated fixed-satellite service frequency assignments. Therefore, because the GSAT application proposed to provide USTV with relatively low power service (and would otherwise be subject to technical constraints on fixed satellites), we concluded that there was not inherent inconsistency between grant of the application and the Final Acts of the WARC or with our interim DBS rules.

5. Because USSB raises the issue of procedures relating to the Commission's authorization of DBS services, we will summarize briefly the DBS service and Commission procedures for processing DBS applications.

6. DBS service is an experimental technology which utilizes

[5] GTE Satellite Corp., 84 FCC 2d 562 (1981).
[6] Report and Order in Docket No. 80–603, 90 FCC 2d 676 (1982).
[7] Report and Order in Docket No. 20271, 70 FCC 2d 1193 (1978).

high-powered satellites and small parabolic receiving antennas for the distribution and reception of video programming. Though frequencies have been allocated for DBS service by the 1979 WARC, final frequency and orbital allotments and other technical parameters for the United States' broadcasting satellite band will not be made until the Western Hemisphere Regional Administrative Radio Conference (RARC) to be held later this month.

7. In 1980, the Commission began a process to establish regulatory policies for DBS to ensure that it serves the public interest.[8] On June 1, 1981, the Commission issued a *Notice of Proposed Policy Statement and Rulemaking* (*Notice*) to consider proposed policies and rules to govern the authorization of DBS service prior to RARC - 83.[9] At the same time, the Commission accepted STC's application for filing and established a 45-day cutoff period for the submission of other applications to be considered with STC's application. The cutoff date ultimately established for competing DBS applications was July 16, 1981.

8. On October 28, 1981, the Commission released a Public Notice (FCC 81–507), 45 Fed. Reg. at 32497, accepting for filing the applications of USSB, Focus Broadcast Satellite Company, and six others. In a *Report and Order* issued in the DBS docket,[10] the Commission concluded that interim DBS authorizations, on an experimental basis, would serve the public interest, subject to the policies and rules set forth in the *Report and Order*. In response to a petition from STC, the Commission released a *Memorandum Opinion and Order*,[11] on November 3, 1981, finding that a number of interim DBS applications were incomplete and unacceptable for filing. This decision was affirmed in a subsequent *Memorandum Opinion and Order*.[12]

9. On November 4, 1982, the Commission granted the applications of USSB, among others, and dismissed the application of Focus Broadcast Satellite Company. The Commission also determined that

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[8] Notice of Inquiry in Gen. Docket No. 80–603 FCC 80–565, released October 29, 1980 (45 Fed. Reg. 72719 (November 3, 1980)). On December 17, 1980, the Commission received an application from STC requesting authority to begin construction of satellites for a satellite-to-home video broadcasting system. The Commission placed STC's application in the docket file and invited public comment on the application.

[9] 86 FCC 2d 719 (1981). In this Notice, the Commission proposed that downlink operations for DBS systems be authorized in the 12.2–12.7 GHz band, and that the 17.3–17.8 GHz band be used for DBS uplinks.

[10] 90 FCC 2d 676 (1982).

[11] 88 FCC 2d 100.

[12] 89 FCC 2d 177 (1982). An appeal of this decision was dismissed. National Christian Network, Inc. v. FCC, No. 82–1345 (D.C. Cir., appeal filed March 31, 1982); Motion for Voluntary Dismissal filed November 18, 1982; dismissed by the court November 22, 1982.

use of domestic fixed satellites would be considered in the context of modifications to the domestic satellite authorizations.

Petition for Reconsideration

10. In its petition, USSB asks the Commission to rescind the GSAT grant, or in the alternative, condition the grant by prohibiting GSAT from offering television service intended for individual reception by the general public.[13] USSB argues: (1) that the grant to GSAT was made without benefit of public comment from interested parties because the public notice failed to describe adequately the nature of the proposed service;[14] (2) that the "GSAT/USTV proposal is an errant DBS application" which must be treated pursuant to the procedures and policies established in General Docket No. 80–603; and (3) that GSAT has not satisfied the requirements of Section 214 of the Communications Act, 47 U.S.C. § 214, in that it has not demonstrated the adequacy of its proposed DBS service, and (4) that the Commission did not find that grant of the application would serve the public convenience and necessity because it did not know the true use for which the facilities would be employed.

11. USSB explains it has standing because as an applicant for interim authority to provide DBS services, its interests will be adversely affected if GSAT's grant is not rescinded. It claims that by filing an acceptable DBS application by July 16, 1981 it became entitled, together with others, to have its application receive consideration prior to applications which were not submitted in substantially complete form until after July 16, 1981.

12. According to USSB, the fact that the public was not given notice that USTV planned to provide DBS service is fatal to the GSAT grant because the public was denied an opportunity to be heard. "It is well settled," USSB states, "that 'the Commission may not, however, inadvertently, give public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut-off by the notice . . .' *Ridge Radio Corporation* v. *FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961)." USSB contends that this principle clearly applies to petitions opposing the grant of an application. It states that GSAT and USTV acted in concert to withhold from the public and the Commission the fact that USTV would provide direct broadcast, not fixed satellite service.

13. USSB contends further that because GSAT is proposing to offer a vehicle for the provision of DBS service, GSAT's application must be considered and processed according to the policies and

[13] SBS and STC argue that direct-to-home service is not appropriate in the fixed satellite service.

[14] Although STC agrees with USSB, SBS does not believe that the adequacy of the notice and comment procedures are at issue here.

procedures which the Commission has adopted in Docket 80–603 to govern interim DBS applications.[15] It maintains that equity and fair play require that the Commission not give GSAT's application, filed February 17, 1982, equal priority with the applicants who filed acceptable applications on or before the cut-off date of July 16, 1981.

14. In addition, USSB suggests that the failure to apply the DBS procedures to the GSAT/USTV proposal raises serious questions about the validity of the processing scheme which the Commission has applied to first and second round DBS applicants, and is inconsistent with the position it has espoused before the U.S. Court of Appeals in *National Christian Network, Inc.* v. *FCC*, *supra* note 12.[16]

15. USSB argues that the DBS proceeding encompasses proposals to use the 11.7–12.2 GHz band. This is evidenced, USSB claims, by the application of Western Union and Focus Broadcast Satellite Company in which Focus proposed to provide DBS programming service in the 12.1–12.2 GHz band via Western Union's Advanced Westar satellite. USSB notes that the Commission, in its *Report and Order* (*supra*, note 6), authorizing experimental DBS services, found the Western Union/Focus proposal appropriate for consideration in that proceeding. The Commission stated that proposals to operate DBS systems outside the 12.2–12.7 GHz band raised significant legal, policy, and technical issues. Similarly, USSB contends, common carriers offering DBS service and these carriers' customers are equally subject to DBS policies and procedures.

16. Substantively, USSB argues that grant of the GSAT/USTV proposal has significant policy implications which need to be addressed in a notice and comment rulemaking proceeding. According to USSB, customers who invest in the receive equipment recommended by GSAT/USTV for use with their system will receive a poor quality television picture and will not be able to receive other DBS signals with their antennas oriented to receive the USTV signal. USSB suggests that USTV will not be able to move to the GSTAR satellite system. Even if USTV can use GSTAR, USSB claims that customers will need antennas with improved discrimination to receive the same quality signal due to the proximity of other satellites operating in the fixed satellite band. USSB argues, therefore, that the GSAT/USTV proposal is directly relevant to the

[15] USSB uses the definition of "broadcast satellite service" developed by the International Telecommunications Union (ITU) for support of its position. ITU defines the broadcast satellite service as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public." ITU, Radio Regulations (Geneva 1982), Art. 1, § 3.18. USSB claims that several of USTV's channels will be advertiser supported.

[16] USSB claims that the Commission's position is that for public interest reasons, the cut-off rules will not be waived to permit late-filed applications to be considered with first round applicants, nor will such applications be accepted *nunc pro tunc*.

overall issue of DBS technical standards, which is under consideration in the DBS proceeding. Thus, it claims, the carrier's facilities are not adequate to provide the service proposed and the public's interest is not well served.

GSAT's Opposition

17. In its opposition, GSAT challenges USSB's position that the Commission failed to give adequate notice of GSAT's application. GSAT states that public notice of applications need only be sufficient to "give interested parties a thirty-day opportunity to learn of an application or substantial amendment. . . ."[17] The notice, GSAT declares, was not to be a total education in and of itself, but only a pointer to the existence of an application.

18. Furthermore, GSAT denied that its application is a DBS filing. According to GSAT, its acquisition of transponders on Telesat Canada's Anik-C satellite, as a common carrier, is for the purpose of distributing the programming services of its customer "point to multipoint." Moreover, it states that when the initial application was filed, the feasibility of direct-to-home transmission was unknown, so it believed it prudent to obtain authority to provide a variety of different services.

19. While GSAT recognizes similarities between fixed satellite service and DBS services, it denies that the similar characteristics transform GSAT's application into a DBS proposal. GSAT points out that it requested authority to use a different set of frequencies than is allocated for DBS and that in accepting the Commission's grant it also accepted power limitations not placed upon DBS services.

20. GSAT also argues that as a common carrier its duty is "to carry for all people indifferently," and to allow its customers to use its facilities to "transmit intelligence of their own design and choosing."[18] Thus, to restrict delivery of USTV's television services, based on whether or not their terminations were single unit dwellings, GSAT maintains, would be in derogation of its duty as a common carrier, and inconsistent with the carrier's statutory responsibility to provide service upon reasonable demand. In GSAT's view, there is nothing unreasonable about USTV's demand to transmit television programming to all fixed points within GSAT's authorized service area where USTV elects to install receiving earth stations.

21. Finally, GSAT finds unpersuasive, and irrelevant, USSB's warning that the public interest will be disserved by GSAT's service. GSAT states that it has explained why and how interference at small

[17] Amendments of Parts 1 and 21, Docket No. 19905, 60 FCC 2d 549, 551 (1976).

[18] GSAT cites National Association of Regulatory Utility Commissioners v. FCC, 413, 525 F.2d 630, 641, n. 58 (1976).

antennas can be minimized if the Commission reduces orbital spacing from 3 degrees to 2 degrees.[19] Moreover, GSAT finds "ludicrous" USSB's supposition that USTV would accept the commercial risks of inability to transfer from temporary use of the ANIK system to permanent use of the GSTAR system. GSAT maintains that the decision whether the price and quality of USTV's service is acceptable is best made by consumers, not by potential competitors or the Commission.

USTV's Opposition

22. In its opposition, USTV asserts that USSB's petition is without merit and must be denied. In addressing USSB's allegation that the public did not receive adequate public notice of GSAT's proposal, USTV points out that the notice provided all of the information required by Section 214 of the Act and Section 63.01 of the Commission's rules. USTV further notes that the Commission's common carrier facilities authorization process does not normally concern itself with the end uses of transmissions delivered over those facilities and there was no obligation for GSAT to divulge the business plans of its customer in its application.

23. Similarly, USTV rejects USSB's contention that GSAT's application is a "DBS application" and the *Order* is a "DBS authorization." USTV reasons that its proposed service using existing fixed satellites to distribute video programming on fixed 11.7–12.2 band satellite frequencies with restricted power, cannot be considered a DBS service. By its very terms, USTV states, DBS entails new DBS satellites in the 12.2–12.7 GHz band with far higher power.

24. In support of this position, USTV cites 47 C.F.R. § 100.1 which specifies that DBS service "shall operate in the frequency band 12.2–12.7 GHz." Moreover, USTV asserts that both the interim DBS *Notice, supra* note 9, and the subsequent DBS *Report and Order, supra* note 6, make clear that the new interim processing procedures relate to proposals for construction of new DBS satellites capable of transmissions at high power in the 12.2–12.7 GHz band. In any event, it states, service to individual residences will constitute only a part of its service.

25. USTV finds erroneous and irrelevant USSB's contentions that USTV's switch to GSTAR will require modification of the reception equipment that will disrupt service and will be costly to customers, and that implementation of 2 degree spacing of orbital satellites will impair the quality of USTV's service. USTV insists that the receive-only antennas that it would employ are designed for

[19] GSAT cites its comments filed March 8, 1982 in Satellite Space Utilization Docket No. 80–741; its petition for reconsideration of Memorandum Opinion and Order, FCC No. 82–233, released May 20, 1982; and its application filed July 12, 1982, File No. 2084-DSS-LA-82.

reception of GSTAR satellite transmissions, and that these antennas also are fully capable of receiving ANIK - C transmissions.

GSAT's January 12 Letter

26. After the pleading cycle had ended regarding the reconsideration petition, GSAT submitted a letter announcing two new developments: (1) that USTV would only need 4 or 5 transponders for its initial service instead of the 10 originally requested and (2) that GSAT was considering requesting modification of its GSTAR satellite construction authorizations to increase the maximum power level on certain transponders on the satellites.[20]

27. The GSAT letter was placed on public notice so that interested parties could respond. Comments were received from various entities including the parties who had participated previously in the reconsideration proceeding.[21] While several issues were similar to those raised previously, the primary issue in these comments is whether USTV's decision to reduce the number of ANIK-C transponders to be leased has any impact on GSAT's authorization.

28. SBS initially claimed that it has available for lease 5 transponders with EIRP levels of 46 dBW which it maintains are adequate signal levels for the service proposed by USTV. Therefore, SBS argues, GSAT should not now be permitted to lease any capacity from Telesat Canada since GSAT's application no longer falls within the intent of the 1972 intergovernmental agreement between the United States and Canada.[22]

29. In response, USTV asserts that contrary to SBS' statements, SBS only made firm commitments to provide 4 transponders, with a fifth becoming available if another customer did not exercise an option. It further contends that even if it had 5 transponders available, SBS could not provide the requisite 47 dBW power level that USTV's business plans require.

Discussion

30. Our *Order* granted GSAT authority pursuant to Section 214 of the Act to acquire by lease ten transponders on Telesat Canada's Anik-C satellite. These channels were to be offered to GSAT's customer, USTV, pursuant to tariff. We noted that Section 214 requires that we find a proposed acquisition or operation of new lines

[20] GSAT later decided not to pursue the modification request. GSAT letter dated January 31, 1983.

[21] General Instrument Corporation, the National Black Media Coalition (NBMC), the National Citizens Committee for Broadcasting/Telecommunications Research and Action Center (NCCB) and Prudential Insurance Company of America, filed their inital comments in response to the public notice.

[22] For support, SBS cites RCA American Communications, Inc., 50 FCC 2d 406, 413 (1974).

will serve the public convenience and necessity before granting Section 214 authority. We further noted that such authority ordinarily will be granted for private line services, unless there is some basis to believe a grant is likely to produce results that conflict with the goals of the Communications Act. Because none of the arguments presented by the parties demonstrates that results inimical to the public interest will result from the authorization, or otherwise demonstrate the authorization was erroneous, the petitions for reconsideration and the relief requested in the supporting comments and comments filed in response to the January 14, 1983 public notice, will be denied. The petition to deny the application to construct and operate an uplink earth station also will be denied. The Section 214 authorization will be modified, however, to reflect the reduction in need from 10 transponders to 5.

Nature of Service

31. None of the parties challenge the contention of the applicant that the distribution of program material to small cable television systems, hotels, motels, hospitals, low power TV stations, STV and MDS stations is properly within the scope of the fixed satellite service. *See* 47 C.F.R. § 2.1. Such services are also consistent with GSAT's current domestic satellite authorizations.[23] To this extent, then, our *Order* can not be at issue. It is only USTV's provision of service to individual residences that raises issues which the parties believe warrant reconsideration. These issues are (1) proper notice was not made to the public that DBS service was proposed (2) as a DBS application, the proposal is subject to the procedures outlined in General Docket No. 80–603; and (3) the public interest will not be served because the technical quality of the received signal will not be acceptable to the public.

32. As we explained at note 5 of the *Order*, the GSAT proposal is not inconsistent with our activities in General Docket 80–603. The proposal is not Direct Broadcast Satellite Service for purposes of the Commission's rules, is proper in the fixed satellite service bands, and should not have been processed pursuant to the Direct Broadcast Satellite procedures.

33. Section 100.1(b) of the rules, 47 C.F.R. § 100.1(b), specifically states that the Rules in Part 100—Direct Broadcast Satellite Service—were designed to make available the frequency band 12.2–12.7 GHz for direct broadcast satellite service. The service is characterized by (1) high power geostationary satellites, (2) operations in the 12.2–12.7 GHz band, and (3) direct reception of signals by

[23] *See* GTE Satellite Corporation, 43 FCC 2d 1141 (1973), 57 FCC 2d 147 (1975), and 84 FCC 2d 562 (1981); 47 C.F.R. § 63.07. It should also be noted that DBS facilities may also be used to serve viewers at such locations in addition to direct reception at individual residences.

the general public using small, inexpensive earth terminals as an initial satellite design objective.[24] While several of these characteristics may be general in the abstract, the difference between DBS and the GSAT proposal are clear: (1) both the Anik-C and the GSAT satellites are designed to operate with approximately $^1/_{10}$th the power of the proposed DBS satellites; (2) the Anik-C (and later, GSTAR) satellite will operate in the 11.7–12.2 GHz band; and (3) the antennas used by USTV will be approximately twice the size of those used in DBS (4–6 ft. v. 2.5 ft.). The GSTAR satellites will operate with 2° spacing, while DBS satellites are proposed to be operated with 8° - 10° or larger spacing.[25]

34. The three factors pointed to by USSB as evidencing that GSAT will be providing DBS service—television service by satellite, direct to the home, by means of 1.2–2.5 meter antennas—are present today in various fixed services. For example, television service has always been considered an appropriate domestic fixed satellite offering.[26] Nor is service by definition precluded to homes.[27] And USTV represents that the location of all homes receiving its service will be known, which distinguishes it from broadcast services where specific points of reception are not known.[28] Even if USTV's service to homes could be considered a broadcast service, it still would not be prohibited. Our present table of allocations allows broadcasting and fixed satellite services in the 11.7–12.2 GHz band. See Section 2.106 Table of Frequency Allocations, 47 C.F.R. § 2.106; *First Report and Order* in General Docket No. 80–739, adopted June 1, 1983. Finally, services (although not video) are now being routinely supplied by domestic fixed satellites to antennas even smaller than 1.2 meters.[29]

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[24] Report and Order in General Docket No. 80–603, 90 FCC 2d 676, 677 n. 1; 723 (1982).

[25] *See* Report and Order in Gen. Docket No. 80–398, FCC 83–102, (released March 21, 1983), at para. 48.

[26] *See, e.g.*, Domestic Communications Satellite Facilities, 22 FCC 2d 86, 88 (1970), where we found that domestic satellites "appear to offer unique promise as an economical means of providing service from one transmission point to many reception points, e.g., for the relay of radio and television programs for entertainment, educational and instructional purposes, and for reaching remote, relatively inaccessible areas."

[27] The definition of "fixed-satellite service" parallels that of the terrestrial "fixed-service" in Section 2.1 of our rules, 47 C.F.R. § 2.1. Service to individual residences is not precluded in the Multipoint Distribution Service, a terrestrial common carrier fixed-service. *See e.g.*, Section 21.903 of our rules, 47 C.F.R. § 21.903; Notice of Inquiry, Proposed Rulemaking and Order in General Docket No. 80–112, FCC 80–136 released May 2, 1980 at paragraph 12; Multipoint Distribution Service, 45 FCC 2d 616, 617 (1974).

[28] USTV Responses to STC at para. 12.

[29] While we have established antenna size criteria for *prima facie* findings of consistency with reasonable orbital spacings, we have not precluded the use of any antenna solely on the basis of its size. *See* American Broadcasting Companies, 62 FCC 2d 901 (1977). Antennas as small as 0.6 and 1.2 meters in diameter are

Thus, we cannot accept USSB's characterization that the GSAT/USTV services are DBS and must be processed within the procedural rules adopted in General Docket No. 80–603.

35. Our DBS processing experience to date also demonstrates that USTV's use of GSAT's facilities to distribute video programming to homes does not subject USTV to the processing procedures of Part 100 of our rules. Our treatment of the application of Focus Broadcast Satellite Company, contrary to USSB's contentions, supports this interpretation. Focus applied, *inter alia*, to use a fixed satellite operating in the 11.7–12.2 GHz band (Western Union's Advanced Westar) for "DBS". We found that Focus did not propose to become a licensee of a facility, but only expressed an intention to use the facilities of broadcast and fixed satellite licensees. Accordingly, we found a DBS application by Focus was unnecessary. We stated that Western Union's companion application to modify the authorized fixed satellite Advanced Westar to provide service to Focus in the 11.7–12.2 GHz band would not be considered as part of a DBS proceeding, but rather would be considered as a modification of Western Union's fixed satellite authorization. *See Memorandum Opinion and Order*, FCC 82–498, released December 3, 1982 at paragraphs 120 and 122. Thus, while the General Docket No. 80–603 proceedings did allow for consideration of the extent to which domestic fixed satellites are available and could be used to provide additional program services, use of domestic fixed satellites for DBS-like services must also be consistent with our domsat technical standards and policies.[30] Clearly, the proceedings in General Docket No. 80–603 were not intended to review our regulation of the nature of services that could be provided over domestic fixed satellites in the 11.7–12.2 GHz bands.

36. In summary, GSAT's proposal differs substantially from those addressed in the DBS proceeding in terms of satellite power, receiving antenna size, satellite spacing and, most important, operational bands. USSB's arguments that the GSAT/USTV proposal is an out of band DBS proposal subject to the procedures established in Part 100 must be rejected. Nor have opponents of the proposal demonstrated that the public interest requires restricting uses of fixed satellites to protect prospective General Docket 80–603 DBS entities from competition. The programming operations of USTV do not need to be licensed pursuant to either our domestic

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now being used by Equatorial Communications and Muzak, respectively, to distribute data and audio programming throughout the country.

[30] One of the serious concerns presented by the Focus/Western Union application to use Advanced WESTAR was the effect of the high power density television carrier on satellite spacing. *See* Petition to Deny by Satellite Business Systems. However, that proposal has since been withdrawn. Moreover, we have addressed the technical basis for these concerns, as well as the procedural aspects of our regulation of domestic satellites, in another proceeding. *See* Report and Order in Docket No. CC 81–704, FCC 83–184, adopted April 27, 1983.

fixed satellite policies or the DBS procedures established in the proceedings in General Docket No. 80–603.[31] No application would be necessary by USTV because USTV is not proposing to build a satellite.

Public Notice

37. As a program distribution service in the fixed satellite service, the notice given of the GSAT Section 214 application was adequate.[32] We indicated the number of channels to be leased, the area within which service is to be provided, and the satellite on which the channels were to be leased.[33] This is sufficient notice in the case of applications to acquire transponders.[34]

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[31] The argument that the GSAT/USTV proposal is actually a DBS service was also raised by NBMC and NCCB in response to GSAT's January 12 letter. *See* note 21, *supra*. NBMC's main concern is that operators in the fixed satellite band do not have to adhere to the Commission's equal employment opportunity (EEO) rules, whereas DBS operators will. NCCB recommends that the actual operation of the DBS portion of the service be governed by the interim DBS rules and that both GSAT and USTV be bound by the permanent rules adopted after the 1983 RARC. We must reject these arguments also. We have determined that neither GSAT nor USTV is subject to the DBS processing procedures. Since USTV is not licensed as a broadcaster either in the DBS service or otherwise, and is not required to be licensed, it cannot be made subject to our EEO requirements. More importantly, even if some aspects of GSAT's proposed common carrier operation are similar to certain of the DBS proposals, GSAT's operation would be consistent with the interim regulatory policies we have adopted for DBS. Thus, for example, the EEO rules adopted for DBS are applicable only to DBS licensees operating as broadcasters and do not apply to common carrier DBS licensees or their programmer customers. *See* 90 FCC 2d 676, 715; 47 C.F.R. § 100.51(a). Hence, neither GSAT nor USTV would be subject to these EEO requirements in any event. If satellite licensees themselves offer predominently broadcast services, *see* 90 FCC 2d at 709, we would expect them to be subject to the same Title III and related requirements specified for similarly situated DBS licensees.

[32] If it were not for the fact that transponders were being acquired for use in non-U.S. satellites, GSAT would not have had to file a Section 214 application. *See* 47 C.F.R. § 63.07(e) and Competitive Common Carrier Rulemaking, 85 FCC 2d 1 (1981); Orbit Deployment Plan, 84 FCC 2d 584, 612–13 (1981).

[33] The parties cite several cases that they claim support their position on the public notice issue. For example, Ridge Radio Corp. v. FCC, *supra*, para. 12; Central Mobile Radio Phone Service, 65 FCC 2d 648 (1977); Domestic Public Land Mobile Radio Service, 60 FCC 2d 549 (1976); and Carter Mountain Transmission Corp., 32 FCC 459 (1962). These cases, however, are inapposite since they are concerned with the statutory notice requirements for radio licenses under Title III of the Act. Here, GSAT did not propose to be a licensee of the ANIK satellite.

[34] The notice issued March 3, 1982 (Report No. D-108) provided:

> W-P-C-4355 GTE Satellite Corp. (GSAT) FORMAL (Section 63.01) Applicant requests authority to acquire by lease and operate a satellite transponder capacity of 54 Mb/s on each of 10 unprotected preemptible transponders on ANIK-C satellite of Telesat Canada (Telesat) which is to be launched in late 1982 and become operational in mid-January 1983. Telesat will submit appropriate request to the Canadian Dept. of Communications for authority to enter into the lease agreement with GSAT. Canadian satellite capacity is requested because of the unavailability of U.S. domestic satellite capacity. The use of the facility will

38. However, as pointed out by petitioners, GSAT's failure to volunteer more specific information at the outset has caused much confusion about its plans. Various reasons are offered by GSAT for initially describing the proposed service as perhaps including "television, voice, data and facsimile." These include GSAT's desire not to disclose prematurely USTV's marketing plans, and the fact that additional information about a customer's precise use of common carrier facilities generally is not disclosed in a facilities application. We expect such disclosure from applicants in cases such as this where the details of the service might have an effect on regulatory classification. Although greater detail about the precise plans later were disclosed to the Commission, initial disclosure would have removed any argument that the public was not properly apprised of the application.

39. In any event, details of the GSAT/USTV proposal were provided to the Commission and placed in the public file. On our own motion, we fully discussed the relationship of the application with our General Docket No. 80–603 and found that grant of GSAT's application was consistent with our DBS policies. Specifically, we noted our policies to keep the fixed and broadcast satellite bands separate were motivated by concerns of disparate power of the two types of satellites and the resultant effect on satellite spacing. We observed (at note 5) that GSAT would utilize a lower power satellite, that we have proposed to reduce spacing at $^{12}/_{14}$ GHz, and that GSAT would not be provided special protection against interference by virtue of the authorization.

40. Finally, notwithstanding our consideration of the DBS aspects of the USTV/GSAT proposal in the *Order*, we have adopted a liberal pleading schedule on reconsideration so that all arguments are fully aired. There were over thirty pleadings submitted on reconsideration, and a variety of appendices attached thereto, which illuminated the issues raised and discussed all aspects of the proceeding in fine detail. Thus, USSB could and all other interested parties, have been fully heard.

Quality of Service

41. We see no merit in petitioner's claim that the public would be ill served by the quality of the program service offered over domestic fixed satellites. USTV has not claimed to offer the same quality of service that would be supplied by satellitees with the technical parameters being developed for planning the DBS service

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be to provide communications services into areas not now directly served by GSAT. Communications to be provided may include television, voice, data and facsimile. The subject transponder capacity is to provide interim facilities necessary to meet customer demand prior to the launch and operation of GSAT's own GSTAR satellite system in 1984.

at 12.2–12.7 GHz at the 1983 RARC. Thus, we see no need to hold USTV to those technical standards.[35] USTV has provided extensive technical analyses of the expected technical quality of its transmissions, and petitioners have not demonstrated any significant technical flaws with USTV's documentation of expected service quality. The only dispute between petitioner and USTV is over the technical standards against which to evaluate this performance. However, USSB and STC cannot impose their technical standards on USTV's service. The USTV ANIK/GSTAR service and USSB/STC DBS service are simply designed to different technical standards. As a practical matter, USTV will meet its objectives and USSB and STC will meet theirs.[36] We have consistently encouraged providers of domestic satellite services to experiment and to tailor the nature and quality of their offerings to customer demands. This is what the parties will be doing, and the consumer will make the ultimate decision of the acceptability of the USTV service. Our primary concern here is to insure that such operations do not lead to increased orbital spacings being required between domestic satellites operating in the 11.7–12.2 GHz band.

42. We therefore see no need at this time to force the USTV service into the DBS mold. GSAT and USTV emphasize that a good portion of their services will be directed to the types of program distribution services traditionally provided over the fixed satellite service facilities. These aspects of the GSAT/USTV undertaking clearly comport with our domestic satellite policies which govern the use of the 11.7–12.2 GHz band. And we find no legitimate public interest reason to prevent the offering of service direct-to-homes. While the band suffers from certain comparative disadvantages with the 12.2–12.7 GHz band, the disadvantages are not so great as to make the USTV/GSAT proposal illusory. To the extent that some aspects of the proposal might appear to take on the characteristics

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[35] DBS planning in preparations for the 1983 RARC is proceeding on the basis of satellites designed from the outset to serve individual homes directly with a high quality signal. Domestic fixed satellites were not originally constructed to provide such service. It was the power difference, resulting from the original design intentions for FSS and DSB, that would lead to inefficient orbit use if both services shared the same band. This fact supported our separate allocation proposals to the 1979 WARC. However, technological advances which allow domestic fixed satellites to deliver television programs to homes, albeit at lower quality and/or with less reliability than true DBS systems, should not be excluded simply because of their lower quality. In these circumstances, we are reluctant to substitute our judgment for that of marketplace forces to determine price, range of service and quality of service that consumers will expect.

[36] This is sufficient to satisfy any concerns we may have established in Associated Press, *supra* note 2. Moreover, we have conditioned our Section 214 grant of GSAT to insure that USTV's service to small antennas does not prejudice our decision in Docket CC 81-704 to narrow spacing between satellites in the $^{12}/_{14}$ GHz bands to 2 °. GSAT represents that USTV's service is compatible with 2 ° spacing.

similar to what others, such as USSB or STC are doing with satellites that are clearly DBS in the 12.2–12.7 GHz band, we are providing flexibility in the course of the implementation of the 1979 WARC by incorporating Footnote 836 in the national table of allocations. Thus, we find that our action approving the GSAT application was fully consistent with all of these policies and proceedings.

Use of Canadian Satellites

43. In our *Order*, we concluded that GSAT's proposal fell within the intent of the 1972 Intergovernmental Agreement between the United States and Canada because an insufficient number of suitable transponders appeared to be available to satisfy USTV's requirements. Since that time, USTV has reduced its requirements to 5 transponders covering the eastern portion of the United States. SBS and other parties at one time claimed that USTV's interim requirements could be satisfied, prior to the availability of the GSTAR satellites, by United States domestic satellites facilities, i.e. the SBS system. Recently, however, SBS informed the Commission[37] that because of its agreement with another entity, it could no longer offer five transponders on one satellite to GSAT. Since SBS is the only U.S. Ku-band satellite carrier currently operating, SBS' statement appears to have removed the number of leased transponders as an issue. We will, however, limit GSAT's Section 214 authorization to the 5 transponders needed to serve its only identified customer for this service.

44. In view of the foregoing, it is hereby certified that the public interest, convenience and necessity will be served by authorizing GSAT to lease capacity on the ANIK-C satellite and constructing and operating the proposed TT&C earth station.

45. IT IS HEREBY ORDERED, that application File No. 000179-DSE-P/L-83 IS GRANTED and GTE Satellite Corporation IS AUTHORIZED to construct and operate a 14/12 GHz transmit/receive Telemetry, Tracking and Command earth station described in the referenced application and associated radio station authorizations. IT IS ALSO ORDERED, that the authorization is effective upon adoption.

46. IT IS FURTHER ORDERED, that GTE Satellite Corporation's Section 214 authorization to lease 10 transponders on the Canadian satellite is reduced to 5 transponders.

47. IT IS FURTHER ORDERED, that the petition for reconsideration filed by United States Satellite Broadcasting Co., Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[37] Letter from SBS, dated May 6, 1983.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON
re:
PETITION FOR RECONSIDERATION OF GTE SATELLITE CORPORATION

I strongly support the Commission's action today reaffirming GSAT's authorization to lease transponders from Telsat Canada. The primary controversy in this case has centered around GSAT's customer, USCI, and that company's proposed use of these facilities to provide video programming directly to the home. Petitioners argued that the GSAT/USCI proposal was really an "errant" Direct Broadcast Satellite (DBS) service subject to the Commission's interim rules established for that service.*

In this Order, we have reaffirmed our conclusion that the GSAT/USCI proposal differs substantially from those addressed in the DBS proceeding. The Commission also concluded that USCI's satellite-to-home video service can properly be provided in the fixed satellite service. Finally, the Commission determined that the public interest would not be served by prohibiting USCI from offering such a service in potential competition with prospective DBS service providers.

Long-standing policy considerations underlie these conclusions not the least of which is that the consumer benefits when satellite facilities are utilized to the maximum extent possible. To ensure these benefits, service providers leasing satellite capacity must be free to use those facilities in innovative and productive ways. With particular respect to USCI's proposal, nothing in the Commission's rules prohibits the provision of television service to individual homes in the domestic fixed satellite service. From a public interest standpoint, USCI's proposal offers a new manner of video distribution adding variety and a corresponding boost in consumer choice.

This gain to consumers would be frustrated by prohibiting USCI's use of fixed satellites to provide home video service in potential competition with DBS. Since the inception of domestic satellite service, this Commission's policies have been directed towards maximizing entry and maintaining a flexible regulatory approach for the very purpose of promoting competitive and innovative service offerings.** Limiting the use of fixed satellites would needlessly thwart this goal with no corresponding benefits to the public.

It is interesting to note in this regard that USCI's early entry into the satellite-to-home video market has prompted other companies to do the same. In an effort to gain an early foothold in the market,

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* *See*, Direct Broadcast Satellite Services, 90 FCC 2d 676 (1982).

** Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970), 35 FCC 2d 844 (1972), *recon. in part*, 38 FCC 2d 665 (1972), (Domsat I, II and III).

Comsat has announced that its subsidiary, Satellite Television Corporation (STC), will begin offering low-powered satellite-to-home service next year rather than waiting for its own DBS satellite. Another company, Inter-American Satellite Television, has also announced similar plans. It is clear from these proposed service offerings that the race to provide home entertainment services via satellite has begun. Additional entrants would not be surprising. At the same time, technological advances in order to provide quality service can be expected.

Not only will the public benefit from this flurry of competitive activity in this market but the public will also decide which of these service providers will survive—those utilizing existing lower powered satellites or those utilizing high powered DBS satellites. Which transmission medium is best suited to providing the quality of service necessary to maintain a customer base is a question which need not be resolved by this Commission. Rather, given the competitiveness of the marketplace, consumer preference, not artificial regulatory restraint, must be the means by which any particular service offering prevails.

CONCURRING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Application of GTE Satellite Corporation to Lease and Operate Transponder Capacity from Telesat Canada

When this matter appeared on our agenda, I voiced my concern that favorable action on GTE's application might adversely affect the United States' ability to obtain necessary spectrum and orbital slots at the 1983 Regional Administrative Radio Conference. A substantial body of informed opinion responded that the decision to allow home video service in the 11.7–12.2 GHz (FSS) spectrum band would not prejudice our position at this conference. I felt I had little choice but to defer to the experts. However, my concern was not entirely assuaged and, accordingly, I concur.

I would also like to point out that the Order's hypertechnical holding that this service is not DBS "for purposes of the Commission's rules" does not obscure the inescapable fact that USTV's direct-to-home satellite television service and the direct-to-home service that will later be offered in the 12.2–12.7 GHz (BSS) band are functionally equivalent.[1] Therefore, substantive regulations applicable to home video service in the BSS must—and will—apply when that service is provided in the FSS.[2] That approach may be of limited

[1] That view is widely shared by the public. *See, e.g.*, "Lowering Skies for the Satellite Business," *Fortune Magazine*, p. 148 (Dec. 13, 1982); "Firm to Start Satellite TV Service by Fall," *Washington Post*, p. C11 (Feb. 3, 1983).

consequence during the "experimental" phase of this new service, but its impact will likely be far more distinct when the Commission adopts final regulations governing direct-to-home satellite television service.

Finally, I would have preferred a slightly more explicit discussion in this Order of the policy judgments involved here. During the pendency of the proceeding to establish interim regulatory policies for DBS, direct-to-home satellite service was not considered to be commercially viable below 12.2–12.7 GHz for largely technical reasons. As a result, the Commission did not squarely address whether such service was permissible elsewhere in the spectrum and, if so, under what conditions.[3]

Apparently, technology has since advanced, and entrepreneurs now believe that direct-to-home satellite television service is commercially viable below 12.2 GHz. That being the case, and given that non-technical substantive regulations applicable to such activity in the BSS will be applied, there is no compelling reason to forestall the introduction of this service to the public.[4]

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[2] *See* Memorandum Opinion, Order and Authorization at note 31. While the GSAT/USTV proposal is consistent with regulatory classification guidelines announced in the DBS Report and Order, I am not unsympathetic to the regulatory concerns raised by USSB in its petition for oral argument as to common carrier DBS licensees and their programmer customers; however, I agree that those issues are better suited to rulemaking than adjudication.

[3] In considering whether to accept the two-party DBS proposal filed by Advanced Westar and Focus, we did express "reservations about the use of the 11.7–12.2 GHz band for DBS" because of the proposal's apparent inconsistency with the United States' position at WARC-79. *See* Memorandum Opinion and Order, FCC 82–498, released December 3, 1982. Because the Focus application was dismissed and Western Union ultimately withdrew its application to modify Advanced Westar's authorization, this is the Commission's first opportunity to pass upon an application proposing use of 11.7–12.2 GHz for direct-to-home satellite television service.

[4] Mixed spectrum use can present spectrum planning and management problems; nevertheless, I am persuaded that it is desirable, for now, to continue a flexible approach to the kinds of services that can be transmitted over domestic satellites.

Common Carrier, Lease Channel Service
Instructional Television Fixed Service (ITFS)
Multipoint Distribution Service (MDS)
Rules, Amendment of

Rule changes reallocate eight channels from the Instructional Television Fixed Service (ITFS) to the Multipoint Distribution Service (MDS) to permit the operation of multichannel MDS systems. Existing ITFS licensees, permittees and applicants are "grandfathered". ITFS licensees may lease excess channel capacity on facilities for other communication services.
-Instructional TV Fixed Service
GEN. Docket No. 80–112

FCC 83–243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service.	General Docket No. 80–112
Inquiry into the development of regulatory policy with regard to future service offerings and expected growth in the Multipoint Distribution Service and Private Operational Fixed Microwave Service, and into the development of provisions of the Commission's Rules and Regulations in regard to the compatibility of the operation of satellite services with other services authorized to operate in the 2500–2690 MHz band.	
Amendment of Part 21 of the Commission's Rules to Permit the Use of Alternative Procedures in Choosing Applicants for Radio Authorzations in the Multipoint Distribution Service.	CC Docket No. 80–116

Petition for Rulemaking filed by Microband Corporation of America to amend Section 21.901 of the Commission's Rules and Regulations.	RM-3540
Application of Channel View Inc. for an Experimental (Developmental) station at Salt Lake City.	File No. 8938-ED-MR-82
Application of Contemporary Communications Corporation for Developmental Authorizations to Establish Multi-Channel Systems (MCS) in New York, Chicago, Los Angeles, St. Louis and Philadelphia.	File No. BPEX-820802KH

REPORT AND ORDER

(Adopted May 26, 1983; Released July 15, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA CONCURRING IN PART, DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER SHARP ABSENT.

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I. *Introduction and Summary*

1. On May 2, 1980 the Commission released a *Notice of Inquiry and Proposed Rulemaking and Order* in General Docket 80–112, 45 Fed. Reg. 29,323 (1980) (hereinafter *Notice*), in which it proposed to reallocate the 2500–2690 MHz band to provide additional channels for the Multipoint Distribution Service (MDS) and the Private Operational Fixed Microwave Service (OFS) and to reduce the number of channels available for the Instructional Television Fixed Service (ITFS). The *Notice* referred to these services as "area wide microwave distribution services" (AMDS) and inquired into their future prospects and anticipated growth.

2. Approximately 200 entities submitted comments and reply comments in response to the *Notice*. On February 10, 1982 Microband Corporation of America (Microband) submitted a 3 volume proposal to create what it termed a "wireless cable system" using frequencies in the 2500–2690 MHz band. Proposal of Microband Corporation of America, General Dockets 80–112 and 80–113 (February 10, 1982) (hereinafter Microband Proposal). Microband simultaneously submitted a "Motion for Acceptance of Additional Comments" requesting that its proposal be accepted as additional comments in this proceeding and in the companion proceeding in General Docket 80–113.[1] On April 20, 1982 the Chief of the Common Carrier Bureau, acting pursuant to delegated authority, issued an order accepting the Microband Proposal as additional comments in these dockets and inviting interested parties to submit reply comments. *Order Accepting Additional Comments*, 47 Fed. Reg. 18,932 (1982). Approximately 190 reply comments were received in response to the Microband proposal.[2]

3. On August 2, 1982 Contemporary Communications Corporation (CCC) submitted a set of applications in which it requested

[1] *Notice of Inquiry and Proposed Rulemaking* in Gen. Docket No. 80–113, FCC 80–137, 45 Fed. Reg. 29,350 (April, 1980). In that proceeding the Commission proposed to revise certain technical rules applicable to the Multipoint Distribution Service, operating in the 2150–2162 MHz band, and inquired into the feasibility of applying the proposed rules to 2500–2690 MHz band.

[2] A list of all those submitting comments in this proceeding is contained in Appendix A. This list includes all comments both formal and informal. Comments that were not filed in a timely manner are hereby accepted as informal comments. Some entities submitted more than one set of comments and hence are listed more than once.

developmental authority to construct what it termed Multi-Channel Systems (MCS) in New York, Philadelphia, Chicago, St. Louis and Los Angeles. The CCC applications are similar in some respect to the Microband proposal and to the experimental authorization we granted to Channel View in Salt Lake City (see note 24, *infra*). They are different in that Microband filed additional comments in response to the *Notice* while Channel View requested authority to construct experimental facilities in Salt Lake City. CCC specifically requested authority to conduct market trials in five cities. It made two basic claims in support of its MCS proposal. First, it claimed that the Commission would receive valuable information concerning certain technical aspects of multichannel operation such as adjacent channel operation and propagation characteristics at ITFS frequencies. Second, CCC claimed the proposed five market developmental operation would provide the industry and the Commission with needed information concerning what CCC referred to as the "intermixture of programming and pricing" for multichannel systems. While we agree that such additional information might be useful, we do not believe that it would be in the public interest to delay introduction of multichannel service while CCC conducts its developmental program. For this reason, we are denying CCC's developmental applications.

4. Our review of the extensive record in this proceeding and our experience with these and other services leads us to the conclusion that the public interest would best be served by a limited reallocation of spectrum from the ITFS to the MDS. There are a substantial number of unused ITFS channels in many areas of the country (several states have no ITFS licensees), and it appears that, while some growth in the ITFS service will occur, this growth is unlikely to exhaust the supply of channels. The market studies presented in this proceeding appear to demonstrate a substantial demand for multichannel MDS. Creating a multichannel MDS service offers a number of public interest benefits including expanding consumer choice, creating lower cost equipment, and providing competition to other services (such as cable television) which should lead both services to construct more quickly and provide better service at lower cost. Accordingly, we herein reallocate the E and F groups to MDS. This will nominally permit us to authorize two systems in each area. Each system would have four channels, which appears to be a sufficient number to satisfy the perceived customer demand. Importantly, four channel systems are consistent with the existing channel plans for this band, and preserving the existing group design should minimize disruption to ITFS operations in the band. Our choice of the E and F groups is prompted by our desire to minimize disruption to the ITFS and other services (such as the potential use of the band by satellite systems). To further minimize disruption to existing ITFS operations, we are "grandfathering" ITFS permittees, licensees and

applicants in the E and F groups. A potential MDS entrant will have to demonstrate to the Commission prior to commencing operation that grandfathered ITFS entities will not suffer harmful interference as a result of the operation of the MDS station. We are by a further notice in this docket proposing to select licensees by lottery. We also are permitting ITFS licensees to lease excess capacity on their existing systems. We believe these actions will result in a more intensive use of the spectrum and represent an appropriate balance of the conflicting public policy interests presented.

II. *Background*

A. *MDS*

5. The origin of this service may be traced to July 31, 1970, when the Commission removed the 3.5 MHz bandwidth limitation that had been imposed on stations using the 2150–2160 MHz band. *Amendment of Part 21.703(g)*, 47 FCC 2d 957 (1970). This action precipitated a number of applications that proposed to use this spectrum for the common carrier distribution of television programming from a central location to numerous points selected by the common carriers' subscribers. At that time, this spectrum was administered as a part of the Point-to-Point Microwave Radio Service. The Commission subsequently concluded the point-to-point rules were not appropriate for administering what had become a point-to-multipoint service and hence proposed to establish a new common carrier service to be known as the Multipoint Distribution Service. *Multipoint Distribution Service*, 34 FCC 2d 719 (1972). In January of 1974 the Commission adopted rules to govern the service. *Multipoint Distribution Service*, 45 FCC 2d 616 (1974), *recon. denied*, 57 FCC 2d 301 (1975). These rules provide for two 6 MHz channels in 50 of the largest metropolitan areas. The channels are designated channel 1 (2150–2156 MHz) and channel 2 (2156–2162 MHz). In all other areas of the country, where the 2160–2162 MHz band is used for rural telephone service, the second channel bandwidth is limited to 4 MHz (2156–2160 MHz) and is designated channel 2A. This channel cannot be used to transmit a standard television signal, which requires 6 MHz of spectrum.

6. The majority of the transmission time now leased by MDS common carrier licensees is used by their customers to transmit premium television[3] to hotels, motels, apartment complexes and single family residences.

B. *The 2500–2690 MHz Band*

7. This band is divided into thirty-one 6 MHz channels and

[3] The term premium television refers to television entertainment programming for which the viewer pays a fee and that is not supported by advertising revenues.

thirty-two 125 KHz response channels. Twenty-eight of the 6 MHz channels and the same number of response channels are allocated to the ITFS. 47 C.F.R. §§ 74.902, 74.939. The remaining three 6 MHz channels and three response channels are allocated to the OFS. 47 C.F.R. § 94.65(f). The remaining 125 KHz response channel is not assigned to either service.

C. *ITFS*

8. The ITFS was created by a Report and Order in Docket No. 14744 adopted by the Commission in 1963. *Educational Television*, 39 FCC 846 (1963), *recons. denied*, 39 FCC 873 (1964) (hereinafter ETV). By this action the Commission allowed the newly created ITFS to use the 2500–2690 band on a shared basis with the existing OFS stations with the proviso that no new OFS stations be authorized in the band for 3 years except for modifications or expansions of existing stations, or for the use of the band by OFS eligible entities for television transmission in accord with ITFS technical standards. Prior to this action the band had been allocated to the Fixed Service for shared use by Operational Fixed Stations and International Control Stations. In taking this action, the Commission stated its intention to observe the amount of use of these channels by educators and "[to] determine what course of action should be taken to encourage the fullest development of the 2500–2690 Mc/s band . . ." at the end of the three year period. *Id.* at 851.

9. The Commission stated in 1963 that the purpose of the service was to transmit:

> instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students. Systems which have been licensed for this purpose may also be used for other incidental purposes among which are the transmission of cultural material and entertainment to these same receiving locations; the transmission of special training material to selected receiving locations outside the school system such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, commercial and industrial establishments etc.; the transmission of special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use; and to perform other related services directly concerned with formal or informal instruction and training. When not being used for such purposes, the facilities licensed under these rules may be used for handling administrative traffic of the licensee such as the transmission of reports and assignments, conferences with personnel, etc. Individual stations or complete systems will not be licensed solely for handling administrative traffic.

ETV, 39 FCC at 853. The Commission further stated that this service could also be used for the relay of such material. *Id.* These service limitations are contained in Section 74.931 of the rules, 47 C.F.R. § 74.931. Elsewhere in this Order, we are amending Section 74.931 to allow ITFS licensees to lease any excess capacity available on their channels (paragraphs 110–127, *infra*). In addition, we are today

opening another proceeding in which we propose, *inter alia*, to broaden permissible uses of the ITFS channels.

10. The Commission limited the eligibility to hold an ITFS license to accredited institutions providing a program of formal education and to those eligible to hold a non-commercial educational TV license. *ETV*, 39 FCC at 853–854. The eligibility standards for the ITFS are contained in Section 74.932 of the rules, 47 C.F.R. § 74.932.

11. The Commission did not consider the use of this band again until 1971 when it adopted the Second Report and Order in Docket No. 14744. *Instructional Television*, 30 FCC 2d 197 (1971) (hereinafter *ITV*). In that proceeding the Commission made the present exclusive allocation of 28 channels to the ITFS.

D. *OFS*

12. As noted above, prior to 1963 the 2500–2690 MHz band was allocated to what was then known as the Fixed Service. When the Commission established the ITFS it allowed the newly created service to use this band and limited the Fixed Service use of the band for three years to expansion or modification of existing stations, or the establishment of new television transmission stations. The traditional Fixed Service use of this band was not for television transmission but rather was for more traditional private microwave communications uses such as multichannel voice and data circuits. The Commission recognized that there were certain traditional OFS users such as municipalities that might have television transmission needs and, although it declined to allow such entities to apply as ITFS applicants, it did invite them to apply for facilities under the rules governing the public safety radio services. *ETV*, 39 FCC at 854. When the Second Report and Order was adopted in Docket No. 14744 the Commission determined that the video transmission needs of municipalities and other entities eligible for Fixed Service licenses could be met by a 3 channel allocation. It based this conclusion on the fact that only 16 stations had been licensed to such entities. *ETV*, 39 FCC at 200. The Commission further suballocated these channels to the Public Safety Service on a primary basis and to all other fixed service eligibles on a secondary basis.[4] This preference was deleted in 1975 when the Commission created what is now known as the Private Operational Fixed Microwave Service. *Private Operational Fixed Microwave Service*, 52 FCC 2d 894, 900 (1975). That action made the three channels available to all eligible entities on an equal basis.

[4] When the Commission allowed the newly created ITFS to use the 2500–2690 MHz band, the move was resisted by the traditional users of this band on the basis that what was being created was a "quasi-broadcast" service and that other portions of the spectrum were more suitable for the new service. It was further argued that the decision could result in the permanent exclusion of operational fixed users from the band. ETV, *supra*, at 874.

13. In 1973 the Commission authorized Columbia Pictures to use what was then known as Business Radio Service spectrum for the distribution of "feature motion picture films" and associated promotional material to "guests" in "hotels". *Columbia Pictures Industries, Inc.*, 39 FCC 2d 411, 413 (1973). In making this grant, the Commission questioned whether this was an appropriate use of the Business Radio Service spectrum and as a result specifically conditioned the grant on the result of the inquiry and rulemaking proceeding in General Docket 19671[5] that was initiated simultaneously with the grant. *Id.* at 412, n.1.

14. In 1981 the Commission issued the First Report and Order in Docket No. 19671. *Use of Private Microwave Frequencies*, 86 FCC 2d 299 (1981), *stay denied sub nom. Operational Fixed Microwave Services*, 87 FCC 2d 768 (1981). After considering the comments submitted in response to its inquiry, the Commission concluded "that it is in the public interest to allow the use of the OFS frequencies for distribution purposes and, more generally, to restrict as little as possible alternative uses of the spectrum." *Id.* at 306. In allowing this use of the OFS spectrum, the Commission noted that it was only "authorizing a licensee to distribute products and services in which the licensee has an ownership or other interest to the licensee's own customers or subscribers." *Id.* at 309. The Commission also specifically declined to authorize a licensee of "point-to-multipoint" microwave facilities in the OFS to transmit any video programming directly to apartment houses, MATV systems or private homes pending resolution of the question of whether the similarity of such services to services such as subscription television requires that they be similarly regulated. *Id.* at 311.

15. In the *Notice* the Commission concluded that if it were to authorize the use of the OFS to distribute entertainment programming to subscribers there would be an increase in demand for the OFS channels in the 2500–2690 MHz band. *Notice*, *supra* at para 37. Since the adoption of the First Report and Order in Docket 19671, we have received more than 1,400 applications from 60 different entities seeking to provide video entertainment services on the 3 OFS channels. In a separate action, we are today excluding the distribution of video entertainment material on OFS frequencies lower than 21.2 GHz for two years.[6] 47 C.F.R. §§ 94.9(a)(1), 94.9(b)(2)(iii).

16. Because we have decided not to allow the distribution of video entertainment material on the OFS channels in the 2500–2690 MHz band at this time, we have concluded that there is no reason to provide additional spectrum for that service in this band. Thus, we will not consider OFS further in this order.

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[5] *Transmitting Program Material to Hotels*, 39 FCC 2d 527 (1973).

[6] *Memorandum Opinion and Order.*, Docket No. 19671, FCC 83–245, released June 23, 1983.

III. *Discussion*

A. *Spectrum Utilization*

17. The Commission based its proposals to reallocate the 2500–2690 MHz band on three tentative conclusions. First, it concluded that the demand for MDS service exceeded the supply. This conclusion was based primarily on the observation that there were a large number of situations in which more than one party had filed for the same channel and that many applicants were proposing to "short space" stations. *Notice*, at paras. 19–23. Second, it was concluded that the 2500–2690 MHz band was under-utilized. *Id.* at para. 28. Finally, it was concluded that if the existing restrictions on the use of the OFS channels were removed there would be increased demand for these channels. *Id.* at para. 57. The Commission recognized a need to develop a better record concerning the facts on which these tentative conclusions were based. For this reason a series of questions was included in the *Notice* to elicit the kind of information needed to make a reasoned decision on the issues before the Commission. *Id.* at para. 52 and Appendix C.

1. *ITFS Spectrum Use*

18. Very few of the comments filed in this proceeding contained quantative information concerning the use of the ITFS spectrum. Most of the comments filed by the ITFS community expressed the view that the spectrum should not be reallocated and supported this proposition with public policy arguments rather than spectrum utilization data. The policy arguments raised in these comments are discussed below. *See* paras. 52–64 *infra*.

19. The most extensive analysis of current ITFS spectrum use was submitted by the Center for Excellence (Centex) of Williamsburg, Virginia.[7] The Centex data showed that as of August 1980 there were 82 operating ITFS stations using 492 channels. The 82 systems were spread over 27 states. California had 15 operating systems and New York had 11 operating systems. Of the 27 states that had operating systems 13 had only one system operating. The Centex analysis also contained data on ITFS channel use in the top 50 markets as defined by the 1979 Arbitron population book. These data showed that in only one market, Los Angeles, were all the ITFS channels being used. In fact, the data showed that the Los Angeles market had 40 channels in use with applications pending for 8 more channels. The data also showed heavy use in several other markets.

[7] The Center for Excellence, Inc. (Centex) "is a non-profit Virginia Corporation engaged in educational, medical and social services delivery, research and research development." Comments of Center for Excellence, Inc. General Docket No. 80–112, at 1 (September 26, 1980). In 1976 Centex began a study program that included a "a biennial study of the use of ITFS across the Nation". This study was updated in 1980. *Id.* Attachment C, 7–8. This data was referred to by several commenters from the ITFS community and many included portions of it with their comments.

New York, Chicago, San Francisco, Boston, Cleveland, Dallas, Ft. Worth, San Diego, and Milwaukee all had 10 or more channels in use. On the other hand Pittsburgh, St. Louis, Seattle, Baltimore, Hartford, and many other large cities had no current channel use. The total number of channels being used in the top 50 Arbitron markets was 319. Of these, 232 were operating in the 9 cities listed above as having more than 10 channels operating. Comments of Center for Excellence, Inc., General Docket 80–112, Attachment C, (September 26, 1980) (hereinafter Centex comments).

20. Microband included as part of its proposal an "ITFS Spectrum Utilization Study." In making this study, Microband claimed that it had been unable to find a "single authoritative source or data base identifying the location and ownership of all ITFS channel licenses." Microband Proposal, *supra*, Appendix H, 1. Microband produced its analysis on the basis of data from: "(a) the FCC non-Government Frequency List, (b) TV Fact Book, (c) Compucon and (d) copies of licenses obtained through Downtown Copy Center." *Id.*[8][9]

21. The Microband survey was different from the Centex survey in several respects. The Centex survey was a compilation of existing and proposed licensees by channel group on a city-by-city and a state-by-state basis. The Microband survey listed on a city-by-city basis for each channel whether there was an existing licensee either within 25 or 50 miles of the coordinates of the channel 1 MDS station.[10] This methodology could have resulted in Microband showing a channel in use where Centex showed it vacant or vice-versa. It is more likely, however, that Microband would show a channel as being occupied

[8] The Downtown Copy Center is a private organization that contracts with the Commission to reproduce our public records and sell the reproductions to the public.

[9] The 50 cities that Microband submitted data for were not the same cities that were the subject of the Centex survey. Centex surveyed the 50 Arbitron markets, whereas Microband surveyed the 50 cities listed in Section 21.901 of the Rules, 47 C.F.R. § 21.901. The two surveys contain 40 common cities. The cities in the Microband survey that were not in the Centex survey were Akron, Anaheim, Gary, Rochester, San Antonio, San Bernadino, San Jose, Syracuse and Toledo. Ft. Worth was considered separately from Dallas in the Microband Survey. The two were consolidated in the Centex Survey. The Cities in the Centex survey that were not surveyed by Microband were Nashville, Charlotte, Greenville, Grand Rapids, Orlando/Daytona Beach, Charleston, Raleigh, Harrisburg, Salt Lake, and Wilkes Barre.

[10] Microband conducted its surveys at 25 and 50 miles because it is generally assumed that if cochannel MDS stations are located more than 50 miles apart, there is unlikely to be harmful cochannel interference. It is also assumed that if cochannel stations are closer than 25 miles that harmful interference will occur. When the separation is between 25 and 50 miles, a detailed interference study must be done to assess the possibility that harmful cochannel interference will occur. Thus, if there are cochannel stations within 25 miles of a proposed transmitter location, the channel is deemed to be in use and not available. If there is no cochannel station within 50 of the proposed transmitter location, the channel is likely to be available.

that Centex showed to be vacant because the Microband data was based on a 50 mile spacing and was on a channel by channel basis as opposed to the channel group basis used by Centex. Thus, the Microband data represents a finer grain analysis of channel use than the Centex study. On the basis of its study, Microband concluded that within 25 miles of the location of the MDS channel 1 station 75% of the ITFS channels are not licensed. It also showed that in 38 of the 50 markets surveyed less than half the channels were licensed.

22. The Commission staff conducted its own spectrum utilization studies based on all stations licensed as of November 1, 1982.[11] The staff study showed that there were 124 licensed ITFS operators using 808 channels. These operators were distributed over 29 states and the District of Columbia. More than half of the licensed channels were located within 25 miles of a major metropolitan area. There were 21 states with no ITFS licensees, 9 states with 1 licensee and 5 states with 2 licensees. On the other hand, California had 22 licensees using 167 channels, New York had 13 licensees using 76 channels, Florida had 12 licensees using 22 channels and Pennsylvania had 8 licensees using 53 channels.

23. The Commission staff also did a computer analysis of the ITFS channel use in the same markets Microband used in its study. The staff analysis was only done for 25 miles. That is, the analysis only considered those ITFS stations located within 25 miles of the MDS station coordinates. The results of the staff analysis were not identical to the results submitted by Microband; however, they were similar. The staff analysis showed more ITFS stations than the Microband study because the staff study was done later and hence included more recently licensed ITFS stations. It should also be noted that the staff analysis also included stations for which construction permits had been granted but which had not yet been licensed. Neither study included pending applications.

24. In its comments on the Microband proposal, the Corporation for Public Broadcasting (CPB) pointed out that the issue of adjacent channel operation must be considered before any conclusions can be drawn concerning spectrum use or availability. The 2500–2690 MHz spectrum is divided in 7 groups of four 6 MHz channels and 1 group of three 6 MHz channels. The channels within each group are not adjacent; they are alternated with those of another group to provide a 6 MHz guard band between the channels within each group. Traditionally ITFS licensees have been granted up to 4 channels in a single group. The operation on these channels is protected from

[11] This survey was done using the Commission's ITFS station card file that is readily available to the public. This file includes all licensed ITFS stations and all stations for which a construction permit has been issued. It is possible that some of the stations included are no longer operating and it is also possible that some stations had not been indexed; however, we believe that it represents a generally accurate picture of ITFS channel use. This study has been made a part of the record in this proceeding.

adjacent channel interference where feasible by not licensing the guard band channel in the same area. This means that if the A group channels (A1, A2, A3, A4) were licensed in a given area, the B group channels that serve as the guard band channels for the A group channels (B1, B2, B3, B4) would not be licensed in the same area. For these reasons, CPB suggests that in analyzing channel use the adjacent channels should also be considered occupied.[12] CPB redid the analysis submitted by Microband on the basis that if a cochannel were licensed within 50 miles of a given set of coordinates or an adjacent channel were licensed within 25 miles of the same coordinates, the channel was in use in that area. CPB also included all channels applied for as well as those licensed in its analysis. The CPB analysis indicates much greater channel use in the 50 metropolitan areas than either the Microband survey or the Commission staff analysis. The CPB analysis does, however, indicate that in 24 of the 50 cities surveyed there are 8 or more adjacent channels available. Further Comments of the Corporation for Public Broadcasting, Engineering Statement, 8, 9 and Figure 11 (July 2, 1982).

25. Although the studies submitted and the study made by the Commission's staff did not produce identical results, the results are similar enough to allow certain conclusions to be drawn. First, in several large metropolitan areas the ITFS channels are heavily licensed. On the other hand, there are several large metropolitan areas in which there are no licensed ITFS stations. Finally, there is little ITFS spectrum in use outside the large metropolitan areas. We believe these conclusions tend to confirm the tentative findings made in the *Notice* that while the ITFS channels are heavily licensed in some metropolitan areas, they are not heavily licensed in other metropolitan areas. Further, neither CPB nor any other commenter offered any evidence that the ITFS channels are heavily licensed outside the major metropolitan areas.

2. *MDS Spectrum Use*

26. As of December 22, 1982 there were 234 licensed MDS channel 1 stations. These licensees were distributed over 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Construction permits had been granted for an additional 114 stations. There were 194 pending channel 1 applications. Of these, 172 were mutually exclusive with at least 1 other application. There were 5 licensed channel 2 stations. Construction permits had been granted for 3 additional stations. There were 143 pending applications for channel 2 licenses in 42 cities. All of these applications were mutually exclusive with at least 1 other application. There were 3 licensed channel 2A stations. Construction permits had been granted

[12] We do not agree that use of one channel group necessarily precludes use of the interleaved channel group. See paras. 65–78, *infra*.

for 16 additional channel 2A stations. In addition, there were 9 pending channel 2A applications for 4 cities. Of these applications, 8 were mutually exclusive with at least one other application.

27. The Commission does not keep records of whether licensed MDS stations are actually operating. Since MDS is a common carrier service, whether a station is on the air at a given time is not determined by the licensee but rather by whether a customer has purchased time from the licensee. At least one private concern, Paul Kagan Associates, Inc., collects such data. According to its latest report, as of August 3, 1982, there were 82 MDS stations operating and an additional 120 stations licensed that had not yet obtained a customer. "Statistical Progress of MDS", *The MDS Data Book*, 64 (October 1982).

28. MDS channel 1 licenses have been granted in 49 of the 50 markets listed in Section 21.901(c) of the Rules, 47 C.F.R. § 21.901(c). A construction permit has been granted for the remaining city. Of the 49 stations licensed, 43 have customers. Outside of these markets there were, as of the date of the Kagan survey, 152 stations licensed. Of these 39 had customers. On the basis of these facts, it can be concluded that the MDS channel 1 is heavily used in the larger metropolitan areas but less used outside these areas.

29. All the channel 2 applications that are not mutually exclusive have been granted. As of December 12, 1982 five stations had been licensed and construction permits had been granted for three additional cities. Only one of these channels has a customer. As was pointed out in the *Notice*, there are certain technical problems that limit the simultaneous use of channel 1 and channel 2 in the same area. The nature of the downconversion equipment used in MDS is such that if different operators are using channel 1 and channel 2, the channel 1 subscribers will be able to receive the channel 2 programming and the channel 2 subscribers will be able to receive the channel 1 programming. Scrambling of both signals would negate this problem, but it is expensive to add scrambling to existing MDS systems. This means that if we were to authorize a channel 2 station in an area that already has a channel 1 station delivering unscrambled programming and the channel 2 station offered scrambled service, the customers of the channel 2 operator could receive both the scrambled channel 2 programming and the unscrambled channel 1 programming. There is a channel 1 station authorized in every locale that has a channel 2 available. Furthermore, because channel 1 and channel 2 have no guard band between them, it is possible that noncolocated channel 1 and channel 2 transmitters could cause unacceptable adjacent channel interference.

30. These factors have contributed to the light use of MDS channel 2. In one city, Phoenix, Arizona, these problems have been overcome. There, Microband is the licensee of channel 1 and

Contemporary Communications Corporation is the licensee of channel 2. American Cable Television is the subscriber of both Microband and Contemporary and programs both channels and has a common set of customers receiving two-channel service.

3. *Projected ITFS Growth*

31. One of the most controversial issues raised in this proceeding concerns the projected ITFS growth. In the *Notice*, the Commission concluded that there are reasons to expect some growth in the demand for ITFS channels, but not such a significant amount that most vacant channels could be expected to be filled. Several commenters from the ITFS community took issue with these conclusions. The comments submitted by the University of Maryland were typical. It claimed that the Commission's conclusion was a "vast under estimation of future ITFS demand." Comments of the University of Maryland, General Docket 80–112, at 3, (September 26, 1980). Those commenting on this issue gave several reasons why they believed the future demand for ITFS channels was much greater than the Commission envisioned.

32. The most commonly made argument concerned availability of funding. Many commenters pointed out that ITFS growth took place without any federal fundiong until the Public Telecommunications Financing Act of 1978, 92 STAT. 2405 (1978) (47 U.S.C. §§ 390–399), authorized. The National Telecommunications and Information Administration (NTIA) to make funds available for ITFS facilities. The NTIA has informed us that in 1979 $1,130,000 was made available for 4 ITFS systems. In 1980 $211,937 was made available for 3 systems; in 1981 $815,260 was made available for 4 systems and in 1982 $570,485 was made available for 4 systems. Thus, NTIA records show that since ITFS has become eligible to receive such funds 15 ITFS systems have received a total of $2,727,682.[13]

33. Other commenters have stressed that the increased use of ITFS to deliver graduate level engineering, scientific and business training directly into the work places of those needing such training will result in accelerated demand for ITFS channels. Typical of the systems referred to are those operated by Stanford University and the Illinois Institute of Technology. Stanford operates a 4 channel ITFS system known as the Stanford Instructional Television Network that is used to transmit graduate level engineering courses and continuing education courses to approximately 20 high technology companies located in California's "Silicon Valley". In its comments, Stanford indicated that it will likely need more channels in the future to satisfy the increased demand for this type of educational

[13] This information was furnished by the Policy Branch of the Office of Policy Coordination and Management of the National Telecommunications and Information Agency.

service. Comments of the Leland Stanford Junior University, General Docket 80–112, Attachment B (September 26, 1980).

34. The Illinois Institute of Technology (IIT) operates a 4 channel ITFS system known as Interactive Instructional Television (IIT/V) that is used to provide graduate level engineering education to over "1200 professional engineers, scientists, and managers annually in the greater Chicago area." Comments of the Illinois Institute of Technology relative to Microband Proposal, Docket 80–112 and 80–113, at 2 (July 2, 1982). In its comments, IIT presented data that indicated the level of enrollment in its program has risen constantly from approximately 100 students per semester in 1976 to approximately 550 students per semester in 1980. (Comments of Illinois Institute of Technology, Docket 80–112, at 8 (September 26, 1980).

35. In some states graduate level and other post secondary instructional television is handled on a state-wide basis by a single entity. For example in Indiana, the Indiana General Assembly established the Indiana Higher Education Telecommunications System (IHETS) to provide for the development of telecommunications systems to meet the needs of public and private post secondary institutions in Indiana. IHETS operates 23 ITFS stations in sixteen Indiana cities using 28 ITFS channels.[14] IHETS intends to add three additional channels to this system in the near future. In the longer term, IHETS sees the need for 19 more channels in Indiana. These stations are used to distribute medical, engineering, and other forms of post secondary education throughout the state of Indiana. Comments in Opposition to Microband Proposal, General Dockets 80–112 and 80–113, James R. Potter, Indiana Higher Education Telecommunications System (July 8, 1982). The IHETS plan is typical of State wide plans to use the ITFS channels. Other states have similar systems either operating or planned.

36. Less comment was received on the future growth in the use of the ITFS channels by elementary schools, junior high schools, and high schools. Dr. Gerald A. Rosander, County Superintendent of Schools, Department of Education, San Diego County, submitted extensive comments showing that virtually all the ITFS channels are used in San Diego. Much of this use is for primary, junior high, and high school education. Comments were received from most of the school districts in San Diego County articulating the value of ITFS delivered programming at these educational levels. Comments expressing the same view were also submitted by several teachers from San Diego County Schools. Thus, while very little comment was

[14] It is useful to note that IHETS provides these 28 channels of service using only 12 different ITFS channels. Furthermore, it does not use more than 4 channels in any city. It uses 4 channels in one city, 3 channels in another city, 2 channels in six cities, and 1 channel in nine cities. Of the 12 channels used, channel A1, B1, and D1 are used 4 times, channels A2 and G2 are used 3 times, channels C1, D2, and E1 are used twice and channels B2, E2, F1 and F2 are used once.

received on the projected growth in the use of ITFS for the delivery of educational programming at this level it is possible that if other school systems followed the lead of San Diego County there would be increased demand for ITFS channels by such secondary school systems.

37. Some comments suggested, on the other hand, that the future growth of ITFS may be limited at this time by what was referred to in the comments submitted by the National Education Association and others as "the proposition 13 mentality". Comments of the National Education Association, Docket 80–113, Appendix A, at 2 (September 30, 1980). These commenters note that when the amount of money available for public schools is being reduced by taxpayers, expenses for educational technologies such as ITFS are usually among the first to be reduced or eliminated. NEA also pointed out that there is a general reluctance on the part of educators to use new technologies. It stated that "many teachers and administrators tend to view educational innovations as fads that will pass if they are ignored." *Id.*

38. Another commenter, the United States Catholic Conference (USCC), indicated that when the Catholic Church institutes its nationwide satellite network, to be known as the Catholic Telecommunication Network of America, local dioceses will use ITFS facilities to connect the satellite earth stations with the end user of the communication service. It is estimated that at least 700 and perhaps as many as 1,050 ITFS channels may be required to fill this need. Comments of Department of Communications, United States Catholic Conference, General Dockets 80–112 and 80–113, 3 (July 2, 1982). The services to be offered on these channels are described as:

> (a) Church-related communications capabilities and (b) community-related uses of the system. Among the Church-related communication capabilities are:
>
> 1. National and regional teleconferencing for Church organizations.
>
> 2. Data and facsimile transmission of the Church's national news service to the 150 newspapers of the American Catholic press.
>
> 3. In-service training for specialized Catholic social service organizations, for example, schools, hospitals, Catholic charities, etc.
>
> 4. Electronic message and related internal digitalized communications.
>
> The community-related uses include:
>
> 1. Educational programming services to local cable systems.
>
> 2. Specialized community-related digital services. (For example, CAT scanner interconnections to regional centralized computer facilities. . . .)
>
> 3. Regional teleconferencing for civic organizations.
>
> 4. Inter-connection for national, non-profit, educational/cultural/inter-religious organizations (via cost-sharing arrangements).

Id. at 4. The growth projected by the USSC is difficult to categorize. Data subsequently submitted by the Catholic Television Network[15] show that 11 Catholic Dioceses are now operating systems that use 108 channels. These 11 systems reach 28% of the U.S. population. Another 7 Dioceses are building systems that will use 84 channels and serve 9% of the U.S. population. Thus, the 18 Diocesan systems either in existence or under construction use 192 channels to serve 37% of the U.S. population. Contrasted with these data are the data concerning the 60 Diocesan systems to be constructed in 2 to 5 years for CTN. These 60 systems will require 720 channels to reach 30% of the U.S. population. On the basis of these figures, it can be concluded that much of the growth projected by USCC will occur in areas where ITFS channels have traditionally been most underutilized.

39. In addition, it is not clear what is encompassed by each of the uses listed. It appears that some of what is to be transmitted is not "instructional and cultural material . . . for the primary purpose of providing a formal education and development to students enrolled in accredited public and private schools, colleges and universities" as required by Section 74.931(a) of the Rules, 47 C.F.R. § 74.931(a). Furthermore, much of the demand projected by CTN will not occur for many years, and when it does occur it will be concentrated in those areas where ITFS channels have been underutilized. Thus, it appears that even if all the channel requirements projected by CTN do materialize it is most likely that sufficient channels will be available to meet the projected demand regardless of the reallocation authorized by this order.

40. Finally, the Association of Hospital Television Networks (AHTN), a national non-profit consortium whose 32 members operate or are planning to operate systems to provide instructional programming for health professions, indicated that although not all these systems use ITFS frequencies to distribute their programming, it is expected that some the systems not yet constructed will use ITFS channels if they are available. Comments of the Association of Hospital Networks, General Dockets 80–112 and 80–113, (July 2, 1982).

41. The growth of ITFS channel use during the pendency of this proceeding has been robust. As noted above, just after this proceeding was started Centex reviewed ITFS channel use and determined that there were 82 ITFS systems using 492 channels. Our own analysis conducted approximately two years later showed that there

[15] On February 7, 1983, the Catholic Television Network (CTN) submitted a document titled "Information Indicating Current and Projected ITFS Utilization by Catholic Dioceses" and simultaneously requested pursuant to Section 1.41 of the Rules, 47 C.F.R. § 1.41, that the information be made part of the record in this proceeding and in the proceeding in General Docket 80–113. The information submitted by CTN on February 7, 1983 is hereby accepted in this proceeding and in General Docket 80–113. This action is taken pursuant to Section 1.415(d) of the Rules, 47 C.F.R. § 1.415(d).

were 124 ITFS systems using 808 channels. Thus the number of ITFS operators has grown by approximately 50% and the number of licensed channels has grown by over 60%. In addition, as of October 1982, we had 183 applications pending for new construction permits.[16] As discussed below, many in the MDS community have expressed the view that this growth was triggered by our instituting this proceeding. This may or may not be accurate. In any event, if an applicant is eligible and otherwise qualified and intends to use the spectrum for the purposes stated in our Rules, we have no basis to question its motivation for deciding to proceed at any particular time.

42. On the basis of the above, the following conclusions can be made. It is likely there will be an increase in demand for ITFS channels for use by institutions of higher education for the delivery of graduate level training to the workplaces of engineers, scientists, and other professionals. There is less evidence that there will be substantial growth of ITFS use by elementary, junior high, and high school systems. There is also some evidence that there will be growth in the delivery of health services information, but such growth is not likely to be substantial. It also is likely that growth projected by CTN that is appropriate for ITFS will occur in areas where ITFS utilization already is low. Finally, in a companion *Notice* adopted today, we are proposing to relieve ITFS licensees of a number of regulatory burdens thereby encouraging the fuller use of the ITFS channels.

4. *Projected MDS Growth*

43. It is very difficult to make predictions about the future growth of MDS. In the *Notice*, the Commission observed that in the 50 major markets and in many of the secondary markets further acceptance of MDS applications is precluded by the cutoff rules. *Notice*, *supra* at para. 19. As noted above, there are mutually exclusive channel 1 applications pending in 84 cities and mutually exclusive channel 2 applications pending in 42 cities. Thus there are no MDS channels available for growth in any major metropolitan, and many non-metropolitan, areas of the country. Furthermore, unless the mutually exclusive applicants reach an agreement among themselves, a comparative hearing is required to resolve each mutually exclusive situation.

44. The principal factor that most of the MDS entities commenting in this proceeding cited as limiting the growth of MDS is the lack of a multichannel capability. Virtually every member of the MDS community that filed comments in this proceeding expressed the

[16] Above 120 of the applications were filed by the Public Broadcasting Service (PBS) and its member stations to provide what PBS terms a National Narrowcast Service. Whether PBS is eligible to be an ITFS licensee is presently under review.

view that if MDS is to survive as an industry, multichannel operation is an absolute necessity. These views were summarized in the comments submitted by the Ad Hoc Committee for Wireless Cable which argued "the expansion of existing MDS service to a multichannel, over-the-air delivery in competition with cable and other forms of distribution is essential to the continued viability of the MDS industry and of its existing carriers and operators." Comments of the Ad Hoc Committee for Wireless Cable, General Dockets 80–112 and 80–113, at 3 (July 2, 1982). This claim is especially noteworthy because the Committee is made up of "representatives from substantially all the Carriers and Operators in the MDS Industry." *Id.* at 2.[17] In addition, Microband and others have submitted data in this proceeding to support the proposition that there is a large unmet demand for multiple channels of premium television that is unlikely to be met by cable television or any other available technologies. (*See* paras. 57–64, *infra*). Microband also submitted studies which it claims establish that the per channel cost for a 5 channel system will be 60% less than for a single channel system because of common equipment and operations. It argues that consumer appeal increases substantially when the number of channels increases but the cost is not substantially higher. Microband Proposal at 57–72.

45. There are two reasons why there is only one multichannel MDS system in operation today. The first reason is, of course, that there are not enough channels available to allow multichannel operation. As noted above, there are only two MDS channels capable of transmitting a standard television signal available in the top 50 markets. Outside of these markets there is only one such channel available. Furthermore, in most of the top 50 markets, a comparative hearing may be required before the second channel is licensed. Even when it is licensed there will be very limited opportunity for even two-channel MDS operation. In general, this appears feasible only if the same operator becomes the customer of both licensees as has occured in Phoenix (paragraph 30, *infra*).

46. The other reason is that Section 21.901(d) of our Rules, 47 C.F.R. § 21.901(d), precludes a licensee from obtaining a second channel in the same metropolitan area until it has operated the first channel for at least one year and can show that there is a public demand for additional service that is not likely to be met by a competing carrier. In the *Notice*, the Commission proposed to repeal this rule and it will be discussed below. The rule is pertinent here because it has been shown to be an impediment to MDS growth.

[17] The Committee is made of both licensed MDS carriers and the MDS operators who are the customers of the licensees. The carriers represent more than 80% of the existing or potential MDS licensees in the top 50 markets and the operators provide programming for 70% of all active MDS channels. Ad Hoc Committee Comments, *supra*, 2 and 1.

Except for this rule, existing channel 1 licensees would be better able to work out arrangements with the channel 2 applicants that would facilitate 2-channel operation. Or the same entity could have applied for both channels and offered 2-channel service to one customer or offered one channel service to two customers.

47. On the other hand, as was observed in the *Notice* and by most of the ITFS commenters in this proceeding, the fact that there are a large number of applications for authority to construct MDS stations does not necessarily mean there is an unmet demand for MDS service. In fact many have claimed that the MDS applications on file are merely a reflection of a "land rush mentality" rather than real demand. Typical of these comments was the view that:

> demand for MDS channels, manifested through applications filed with the Commission and the demand for MDS service, are two entirely different things. Many MDS applicants, like land speculators, are applying for spectrum with no certain knowledge of what they would do with an MDS channel and, in many cases, with no immediate plans for using any MDS channel which may be granted to them.

Comments of the Association for Higher Education of North Texas, et al., General Dockets 80–112 and 80–113, at 14 (July 2, 1982).

48. Many members of the ITFS community submitting comments regarding MDS channel use and projected growth did so on the basis of information supplied by Centex. For this reason, we believe it is appropriate to comment on the Centex MDS analysis. Centex submitted an analysis of the growth of MDS from 1972 thru 1980 that Centex claims "points to fundamental errors in the FCC analysis of MDS channel needs." Centex Comments, *supra*, Attachment C, 12. Centex claims that during this period a total of 1,771 MDS applications of various types were filed. Centex also states that "there are, in fact 21 different types of applications listed by the FCC, of which *only 8 deal directly with construction permits and licenses*, while 13 deal with modifications or additions. The FCC dockets fail to make this important point clear." *Id.* The Centex data shows that of 1,771 applications filed 1,137 were for construction permits and 102 were for station licenses. Because of this Centex exclaims "the number of applications for licenses for new stations is, however, only 102 or *5.8% of all applications*!" *Id.* at 13 (emphasis in original). The Centex data also shows that of a total of 239 channel 2 applications, only 2 were for licenses. On the basis of this data Centex makes the following assertion:

> Since serious operators—both profit and non-profit entities—usually aggressively pursue their applications for construction permits and assiduously pursue station construction authorizations, one could rightly ask, why has this not occurred in the case of MDS? Is it because applications are being made on the basis of Oklahoma-type land-grabs with the hope that valuable "mineral" or "farm lands" may be acquired? Regardless of the basis for the current status of MDS applications, the fact that only 1 of every 14, or 7%, of all MDS channel

applications has developed into an FCC-licensed operation is indicative of the real status of MDS.

Id. at 14.

49. We recognize and appreciate that Centex is the most reliable private source of ITFS facility data; however, we believe that these comments suggest a misunderstanding of the MDS industry and Commission processing procedures on Centex's part. When an entity desires to construct a MDS facility it submits a construction permit application to the Commission. If the application is *not mutually exclusive with another construction permit application* and is complete in all respects and if the Commission finds that the applicant is legally, technically and otherwise qualified, the Commission will grant the requested construction permit. After the permittee constructs the station it will then apply for a station license. As is clear from the statistics quoted by Centex, there are many more construction permit applications than there are channels available and thus most of the construction permit applications received are mutually exclusive with at least one other application. None of these mutually exclusive applications can be granted until either a comparative hearing is held or the mutually exclusive applicants reach a satisfactory settlement agreement. This situation accounts in part for the slow growth in the number of MDS stations.[18]

50. It also may be that there is some truth in these assertions. It does appear that in many areas the development of MDS has been slow (*see* para. 28, *supra*). The data submitted by MDS interests suggest that the marginal cost of providing additional channels is sufficiently low that additional penetration could be anticipated were multichannel operations authorized (*see* para. 44, *supra*).

51. On the basis of the information presented, we conclude that there will be little growth in the use of MDS channels as long as there are only two channels available and each licensee is only allowed to use one channel per metropolitan area (*see* para. 44, *supra*). The market for single channel MDS in many areas is limited (*see* para. 28, *supra*). We further conclude that if more channels were made available and if the restrictions on multiple channel operation

[18] The Centex comments also included a table that represented a statistical comparison of MDS, OFS, and ITFS. In this table, Centex claimed that 98 MDS stations served a total of 133 receive sites with an average 1.4 receiving sites per installation. *Id.* at 19. It is not clear where Centex obtained these figures, but it is clear that they represent a gross misstatement of MDS channel use. According to the figures compiled by Paul Kagan Associates, Inc. as of June 30, 1980 the MDS industry was providing premium television service to 352,000 individual locations. MDS Data Book, *supra*, at 12. It may be that what Centex did in its analysis was confuse the number of entities purchasing time from MDS stations with the number of locations receiving service via MDS. In the usual MDS situation there is a single MDS licensee with a single subscriber who provides service to a large number of customers.

are removed there could be a rapid acceleration in the growth of MDS.

B. *Public Policy Considerations*

52. Several ITFS commenters in this proceeding claimed that even if the ITFS channels are not now fully utilized, as a matter of public policy, the Commission should continue to keep all 28 channels reserved for ITFS. For example, the American Library Association asserted that "as a matter of public policy the Commission should retain this spectrum for noncommercial educational use. As the guardian of the airwaves for the public, the Commission has a special responsibility—in our judgment—to set aside a portion of the spectrum for the benefit of the public, just as is done in the case of land development in Alaska and the Far West." Comments of the American Library Association, General Docket 80–112, at 3 (September 5, 1980). The National Association of Educational Broadcasters stated that:

> The growth of instructional telecommunications systems depends on the concept of reservation. Educational and public telecommunication interests should not be forced into the "marketplace" with commercial and private microwave system operators. The ITFS band is the last "free" resource available to the country for educational purposes. The Commission maintains the noncommercial reservation of the lower 4 MHz of the FM radio band and of unused assignments in the TV Table of Allocations, despite the pressures from would-be commercial broadcasters to invade this reserved territory. Maintenance of the reserved nature of the 2500–2690 MHz band is also warranted by the same policy considerations.

Comments of the National Association of Educational Broadcasters, General Docket 80–112, 6 (September 26, 1980).

53. We recognize that there are sound public policy reasons for creating spectrum reserves. In the order granting the exclusive use of the 28 channels to the ITFS, the Commission concluded that "[b]y providing the exclusivity desired by the educators, planning of the system as well as usage should be simplified since they will not need to consider the questions of new non-ITFS systems." *ITV*, *supra*, at 200. In the same order, the Commission recognized that it should wait longer to review the use of spectrum allocated for educational use "because it was aware of the problems encountered by educational interests in preparing funding and implementing the new tool as well as developing the operational expertise . . . ." *Id.* at 199. We continue to believe that the concept of a spectrum reservation for educational and other public service entities is valid. We also continue to recognize, as many of the ITFS commenters in this proceeding have again emphasized, that the nature of educational institutions is such that it will generally take them much longer

than it would take a commercial entity to begin using a new technology such as ITFS.[19] It has been pointed out in this proceeding that educators are slow to accept new technologies and that many of the funding sources for education are even slower to make funds available for innovative endeavors such as ITFS. We also note in this regard that in its comments, Microband stated that "[w]hile it might be argued that school systems, which must pay for land, buildings, supplies, electricity and other facilities, should otherwise compete in the free market for these channels, we do not subscribe to such an approach. Instead, we would urge the retention of a number of channels for exclusive ITFS use." Comments of Microband Corporation of America, General Docket 80–112, at 27 (October 9, 1980). We agree. Thus, we continue to believe it is in the public interest to have a spectrum reserve for the ITFS.

54. Deciding that it is the public interest to have a spectrum reserve does not mean, however, that a 28 channel nationwide reserve is in the public interest. In this proceeding, we have tried to determine whether the channels that have been available for the ITFS since 1963 are now being used or will be used in the future. As summarized above, the evidence indicates that in some of the largest metropolitan areas most of the ITFS channels have been licensed. In other metropolitan areas, there has been limited or no use of the channels. In many states, there are no channels in use, and in most of the other states, there is little use outside of the metropolitan area. Although it is difficult to make accurate projections concerning the future use of these channels, the evidence available indicates that there will be some growth, but not enough to fully utilize all the channels on a nationwide basis.

55. Having found that there are ITFS channels that are not now being used and are unlikely to be used in the near future, we are faced with the question of whether it would be in the public interest to reallocate some of them for use by MDS as proposed in the *Notice*. MDS is now used primarily for the distribution of premium television to hotels, motels, apartments and single family residences. In its proposal, Microband submitted extensive evidence that there is a large unmet demand for multichannel premium television and that "cable (television) is not capable of meeting the existing demand . . . now or any time in the forseeable future." Microband Proposal, *supra*, at 55. Microband further argues that making more channels available for MDS would act as a competitive spur to the cable television industry and that "[s]ince there are no alternative distribution systems authorized to provide multichannel broadband service, cable has been able to behave as a monopoly industry,

[19] It could be argued that ITFS can no longer be considered a new technology since it has been available for almost 20 years. However, it is only recently that many of the school systems and universities have become aware of its potential.

building at a schedule suited to its own pace, with little incentive to upgrade antiquated systems." *Id.* at 12 (footnotes omitted). Microband concludes that an expanded MDS would "provide a competitive spur to cable, thereby moderating its monopoly characteristics and speeding its growth." *Id.* at 25.

56. On the other hand, most of the ITFS commenters expressed the view that expanding the MDS was unnecessary in view of the number of alternative methods of delivering entertainment programming to the public. The Public Broadcasting Services (PBS) comments were typical. PBS asserted that:

> Microband's argument that multichannel MDS systems should be used to increase competition for cable television does not justify a departure from the nation's long established and sound policy of assuring adequate telecommunications resources for educational purposes, especially when that competition is provided by numerous other technologies. Nor are multichannel MDS systems required to fill in service gaps where cable television is not available. With the explosion of STV, and DBS and low power television on the short-term horizon, there will be more than sufficient alternative services available to the public in both urban and rural areas. Low power television and DBS, in particular, have been highly touted as solutions to the problem of underserved rural areas.

Comments of the Public Broadcasting Service, General Dockets 80–112 and 80–113 (June 2, 1982).

57. These comments do not demonstrate that there is no substantial public demand for additional premium entertainment programming. Rather, they address the matter of how the demand should be met. As to the timing of the introduction of other new services, we note that there is no multichannel alternative to cable available now. STV is a one channel service. A high power Direct Broadcast Satellite service, transmitting entertainment programming directly to individual homes on a widespread basis, is several years away.[20] Low power television as a means for delivering subscription television is basically a low power version of STV. In any case, multichannel MDS will expand consumer options, and expanding consumer options is a legitimate public interest justification for reallocating spectrum. If those who claim there is no market for multichannel MDS are correct then whatever spectrum is allocated for multichannel MDS will go unused and can be reallocated back to the ITFS or to some other appropriate use.

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[20] A number of entities (*e.g.* United Satellite Communications, Inc.) have announced plans to attempt to use low power fixed satellites to deliver video entertainment programming to individual homes, in addition to traditional fixed satellite reception points (cable television systems, MDS systems, hotels, etc.). The fixed satellite service is at a comparative technical disadvantage vis-a-vis the direct broadcast satellite service because, among other things, the lower power transmitters require larger receive antennas and the satellites are spaced more closely together which increases the possibility of interference. In any event such systems are nascent in design and may be subject to further regulatory considerations.

58. If, on the other hand, a market does develop for multichannel MDS there would be benefits to the public at large and there could be large benefits to the users of the ITFS channels as well. For example, in both this proceeding and in the companion proceeding in Docket 80–113, we have been informed by ITFS licensees that there has been no reduction in the cost of the equipment they are being offered by manufacturers. This is in direct contrast to the MDS industry where the cost of the downconversion equipment has decreased from over one thousand dollars to less than one hundred dollars. We believe that if there is widespread use of multichannel MDS there could be similar reductions in the cost of ITFS equipment. These savings would result from economies of scale in the manufacture of reception equipment. This could result in dramatic decreases in the cost of constructing ITFS systems thereby making them affordable to many who cannot now afford to build these systems.[21] Lower cost ITFS reception equipment could also make it possible for existing ITFS systems to expand the market for their programming. It could become economically and technically feasible to deliver instructional programming directly to private homes.

59. Microband further claims that authorizing multichannel MDS would be in the public interest because it would "promote economic activity in a high technology field which is important to the nation's future." *Id.*, at 73. Microband estimates that the authorization of the multichannel MDS could provide 20,000 new jobs. *Id.* Bogner Broadcast Equipment claims that the authorization of multichannel MDS would cause equipment manufacturers such as itself "to develop new, improved and competitively priced multichannel reception equipment." Bogner further claims that "the stimulus will have a ripple effect throughout the industry benefitting manufacturers, marketers, retailers, MDS licensees, MDS programmers, and most of all the consumer." Comments on Proposal, Bogner Broadcast Equipment Corporation, General Dockets 80–112 and 80–113, at 2 (June 2, 1982). Other equipment manufacturers have expressed similar views. Conifer Corporation asserts that authorization of multichannel MDS "will create new business opportunities and will benefit the economy." Comments on Proposal, Conifer Corporation, General Dockets 80–112 and 80–113, at 2 (June 2, 1982). Lance Industries states that authorizing multichannel MDS "will cause a re-vitalization of a significant segment of the American-based electronics manufacturing industry" and thereby "create jobs and benefit society as a whole." Comments in Support of Rulemaking Proposal, Lance Industries, General Dockets 80–112 and 80–113, at 2 (May 28, 1982).

60. Another public interest argument made by some commenters

[21] This does not argue against reallocation of a portion of the band to MDS because the premise of the reallocation is based on commercial operation.

is that authorizing multichannel MDS will make multiple premium television channels available to rural areas that may never be served by conventional cable television. One citizen from West Virginia made the following observation:

> Any survey of rural America will demonstrate that the presently allocated instructional television fixed channels are not being used or are used only in a minimal fashion in rural areas. The likelihood that a multi-channel MDS service would impinge on the availability of such channels for instructional purposes is most remote at best.
>
> I really believe that it is about time that your agency give as much consideration to expanding various electronic services to rural America as you give to increasing the plethora of electronic services that are available in the larger markets.

Informal comment of S. Craig Curtis, General Dockets 80–112 and 80–113 (May 8, 1982). An MDS operator from New Hampshire surveyed potential multichannel MDS customers and submitted the following summary of the responses received:

> Most of these residents cited a recent article that appeared in the newspapers concerning a small town that was considering Cable Television, wherein one of the politicians stated that "Only 50% of the residents in the State of New Hampshire will ever have Cable Television Service." Their general reaction to this article is that when an electronic type of service is available to provide them with this service, which will not cost the taxpayers any additional money and will actually employ more people in the State, why should they be deprived of this service simply because they choose to build their home and raise their family in a suburban type of atmosphere? Others expressed views that they realized that it was more costly for their water, sewage system and fire insurance rates where their homes have been erected, but their reaction was, "Isn't this what the United States is all about—Freedom of choice?" And they felt as long as they were willing to pay the cost for their freedom, the FCC should provide them the same equal opportunity that is provided to those who have elected to live in a large city, provided the cost is paid for by themselves, and not the State or Government.

Comments of Dynamic Sound, General Dockets 80–112 and 80–113, at 3 (June 1, 1982).

61. Two major public interest arguments favoring the authorization of multichannel MDS are efficiency and flexibility. It is clear that substantial demand exists for multichannel premium television service. In uncabled areas (some of which may never be cabled), multichannel MDS is a means for satisfying consumer demand for additional premium television service. In areas that are or are about to be cabled, competition from multichannel MDS may spur cable systems to build promised systems faster, improve existing systems, and keep prices low. The efficient production of goods and services and the efficient use of spectrum are promoted when competition among providers is present.

62. Multichannel MDS is also a particularly flexible service. While current indications are that its primary use would be for premium video, many other uses are possible (*e.g.*, high speed data

transmission or transmission of educational programming). The common carrier nature of MDS means that the type of service provided can change on public demand. Thus, frequencies authorized for multichannel MDS use are likely to be employed in their highest valued use.

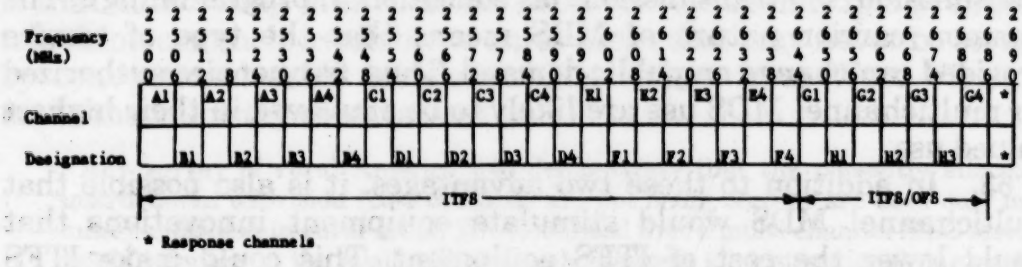
63. In addition to these two advantages, it is also possible that multichannel MDS would stimulate equipment innovations that would lower the cost of ITFS equipment. This could make ITFS service more widely available.

64. The major argument raised in opposition to the reallocation, other than the spectrum reservation argument discussed above, is that multichannel MDS is not needed because there are other technologies available to meet whatever demand exists. After carefully considering all these arguments, we have concluded that reallocating some ITFS channels to MDS will serve the public interest. We believe the benefits noted above are sufficiently likely to permit MDS entrepreneurs an opportunity to expand consumer choice by offering a multichannel MDS service. Should these benefits not materialize, a further reallocation may be undertaken. We do not believe our reallocation plan, discussed below, compromises the legitimate needs of the ITFS community for channels of communication.

C. *Reallocation Plans*

65. Before reviewing the reallocation plans considered, we believe it is useful to review the existing allocation scheme used for the 2500–2690 MHz band. The band is divided into thirty-one 6 MHz channels and the same number of 125 KHz response channels.[22] (The final 125 KHz of the band is not allocated for these services.) The thirty-one 6 MHz channels are contained in the portion of the band from 2500 MHz to 2686 MHz and the thirty-one 125 KHz response channels are contained in the band from 2686 MHz to 2689.8750 MHz. The thirty-one 6 MHz channels are further divided into 7 groups of 4 channels each and a single group of 3 channels. The 4 channel groups are designated channel groups A through G and are assigned to the ITFS. The 3 channel group is designated the H group and is assigned to the OFS. Within each group there is a 6 MHz gap between each of the channels. That is, channels within each group are not adjacent; they are alternated with those of another group to provide a 6 MHz guard band between the channel within each group. The chart below illustrates the allocation plan.

[22] The response channels are used by some existing ITFS channels to allow students in the remote class rooms to speak with the instructor at the studio. Other systems use telephone lines for this purpose and their response channels are unused.



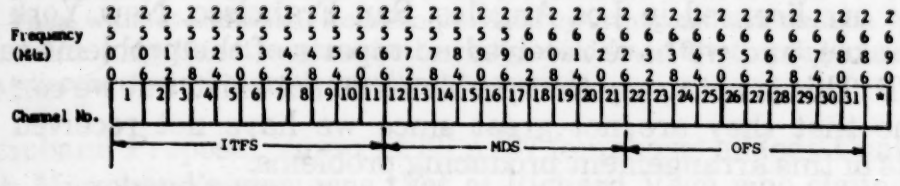
66. ITFS licensees are limited to no more than 4 channels in a single area, all of which must come from the same group. 47 C.F.R. § 74.902(c). If an applicant is not ready to use all four channels when it first applies, it may request the remaining channels be reserved for it for future use. *Id.* In those situations in which there are two ITFS licensees in the same area, the channel groups are assigned in so far as is possible so that there is no adjacent channel operation. For example, if there were an A group licensee in a given area, we would try to avoid granting a B group license in the area. It should also be pointed out in this regard that our rules provide for reusing channels in the same area if doing so would not cause harmful interference. 47 C.F.R. § 74.902(d).

67. The principal reason for adopting the present scheme was that it allowed the use of simple and inexpensive reception equipment. *Instruction Television Fixed Service*, 2 RR2d 1615 (1964). The equipment used to receive an ITFS signal consists of an antenna, a downconverter and a conventional television receiver. The downconverter simultaneously converts the incoming signals from the four ITFS channels (if four channels are being transmitted) to four VHF television channels. The VHF channels used are usually either 7, 9, 11 and 13, or 8, 10, 12 and 13(+).[23] Which set to use is determined by which VHF channels are used in the area. This eliminates the possibility of the VHF stations interfering with the downconverted ITFS channel. It also allows the local television channels to be distributed on the same cable as the downconverted ITFS channels. *Id.* at 1617.

68. In the *Notice*, we proposed a plan whereby the 31 channels in the 2500–2690 MHz band would be reallocated for shared use by the ITFS, the MDS and the OFS. Under this plan there was to be a primary allocation of 11 channels to the ITFS, 10 channels to the OFS, and 10 channels to the MDS. We also proposed that if the primary allocation of a service was fully used in one area any unused channels in the other two allocations could be used to satisfy the excess demand in the fully used service. The proposed plan did away with the channel groups described above and replaced them with

[23] The designation 13+ refers to the use of the spectrum immediately above channel 13. This is made possible by adjusting certain circuits within the television receiver. Further Comments of the Corporation for Public Broadcasting, General Dockets 80–112 and 80–113, Engineering Statement, at 6 (July 2, 1982).

contiguous allocations. The chart below illustrates the proposed allocation plan.



* Response channels

69. This plan received virtually no support from the commenters in this proceeding. It was criticized as being technically not feasible and unduly disruptive of the existing ITFS allocation scheme.

70. The claims that is was technically not feasible were all based on the belief that adjacent channel operation cannot readily be achieved. Several reasons were given to support the claim. First, some claimed that adjacent channel operation would preclude the use of the block downconversion equipment now used by virtually all ITFS systems. One of the major advantages of the block downconversion technique is that it "avoids interference created from 'direct pickup' of a VHF television station by the television receiver, or by a 'MATV' system used to distribute converted ITFS signals to school classrooms." Further Comments of the Corporation for Public Broadcasting, General Dockets 80–112 and 80–113, Engineering Statement, at 5 (July 2, 1982). If adjacent channel operation were required, the local VHF television signal would be picked up by the television receiver being used to display the ITFS signal and cause a degraded picture. CPB outlined a downconversion scheme that would mitigate this problem but that would also produce another problem, interference with the reception of the local VHF signals carried on the same distribution system. *Id.* at 6. The equipment required to implement the downconversion scheme was much more complicated and expensive than existing ITFS downconversion equipment.

71. CPB also mentioned two other problems that could occur with adjacent channel operation: unavoidable unauthorized reception of the adjacent channel programming and downconverter overloading. *Id.* at 2. The unauthorized reception referred to by CPB would occur when different licensees were using interleaved channel groups. For example if one ITFS licensee were using the A group and another ITFS licensee were using the B group in the same area, the block downconversion equipment used at the receiving sites of both licensees would be capable of receiving programming from both licensees. The other problem raised by CPB, downconverter overloading, could result if 8 strong signals were received at a single location from two nearby ITFS stations. CPB claims that the presence of eight signals in the downconverter would produce intermodulation interference to both systems.

72. Notwithstanding the theoretical merits of CPB's criticisms, we note that there are many large metropolitan areas where interleaved channel groups are being used. For example, the A and B groups are licensed in Los Angeles, San Francisco, New York and Milwaukee, and we have received no reports of the problems raised by CPB. This is not to say that problems do not exist, but we can only assume that they are not great since we have not received any reports of this arrangement producing problems.

73. Another commenter claimed that adjacent channel operation would eliminate the ability of ITFS operators to use the same transmitter for both the aural and the visual channels as is done now and force them to the expense of using a separate transmitter for each channel. It was claimed the present "mode of operation simplifies the transmitter and makes it less expensive but also complicates the suppression of energy outside the particular channel transmitted." Comments of National Instructional Telecommunications Council, Inc. and Catholic Television Network, General Docket 80–112, Attachment H, Engineering Statement by Jules Cohen & Associates, at 2 (July 26, 1980). According to Mr. Cohen single transmitter operation would produce so much interference that adjacent channel operation would be impossible. Finally, Dr. William Kincheloe, Jr., Adjunct Professor of Electrical Engineering at Stanford University concludes, "that such a major change in policy for frequency allocations as that proposed by the adjacent channel assignment in Docket 80–113 should be done with great care if a situation is not to develop where many instances of degraded service would be experienced to the embarassment of the FCC." Comments of the Leland Stanford Junior University, Attachment A at 6 (September 26, 1980).

74. These and other commenters are only claiming that the adjacent channel operation that was implicit in our proposal is not technically feasible *using existing ITFS equipment.* None has claimed that such operation is not technically feasible using state-of-the-art engineering practices. In fact, the Corporation for Public Broadcasting made the following claim in its first set of comments:

> With present state-of-the-art engineering practices, it is no longer necessary to restrict distribution systems to alternate channels. Primarily by careful control and maintenance of signal strength ratios, systems can be constructed to successfully utilize adjacent channels, as in the now common cable television distribution systems where all 12 VHF channels are filled.

Comments of the Corporation for Public Broadcasting, General Docket 80–112, Appendix 1, at 57, n.1 (September 26, 1980).

75. In its proposal Microband expressed some doubt about adjacent channel operation using *existing* MDS equipment. It stated:

> We rejected a scheme which would make use of a block of contiguous channels all operating on the same polarization. The major difficulty associated with this plan is not knowing what the adjacent channel interference performance of such a

system would be. *Existing equipment* type accepted for MDS and ITFS operation would not be capable of operating without significant adjacent channel interference because the vestigial sideband attenuation required by paragraph 73.687 of these Rules does not provide for sufficient isolation between adjacent channels. Thus, without additional isolation provided by orthogonal polarization operation and/or a significant increase in the vestigial sideband filtering, interference-free adjacent channel operations will not be possible.

Microband Proposal, *supra* at 33 n. 37 (emphasis added). Contrasted with Microband's view was that of Richard Vega who claimed that "the transmission of copolarized adjacent channels can easily be accomplished by relatively *simple and inexpensive modifications* to existing type accepted MDS transmitters." Comments of Richard L. Vega. General Dockets 80–112 and 80–113, at 5 (July 2, 1982) (emphasis added). Mr. Vega further claims that the multichannel experiment being conducted in Salt Lake City supports this claim. *Id.*[24] In its comments, Contemporary Communications Corporation (CCC), while agreeing with Microband's claim that the existing MDS and ITFS transmitters will not allow adjacent channel operation, contends that "state-of-the-art transmitters are readily available today whose technical specifications will permit adjacent channel operation using the same polarization without causing interference." Additional Comments of Contemporary Communications Corporation, General Dockets 80–112 and 80–113, at 19 (July 2, 1982). CCC also suggests that modifications of some sections of the rules would make adjacent channel operation easier. *Id.*

76. Many ITFS operators have claimed that even if adjacent channel operation were technically feasible the costs of the necessary equipment changes would be prohibitive. For example, the University of Southern California stated "the suggested channel reallocation would entail significant additional costs which educational institutions in their present financial circumstances, can ill afford." USC further argued that "[a]ny new allocation schemes that would increase the technical complexity of existing ITFS equipment would undermine the very basis upon which the low cost educational

[24] On December 3, 1981, the Commission granted Channel View, Inc. an experimental station license to test the technical feasibility of transmitting eight adjacent channels from a single site. The station is designated KM2XBN. File No. 866-ED-PL-81. The early results submitted by Channel View indicated some difficulty in reducing the spurious emissions from the transmitter more than 60 dB below the peak visual transmitter output; however, subsequent design adjustments in the transmission equipment have solved this problem and the tests have demonstrated that operating an 8 channel system using adjacent channels appears to be technically feasible. Channel View subsequently sought permission to conduct a "market experiment" using these frequencies. File no. 8938-ED-MR-82. In particular, Channel View requested authorization to program its multichannel system with premium programming and to provide service to the public for profit. The original experimental authorization prohibited Channel View from offering multichannel service to the public for profit. In view of our action reallocating spectrum, a market experiment would serve no useful purpose and that portion of Channel View's application therefore is denied.

use of ITFS was originally promoted." Comments of the University of Southern California Instructional Television Network, General Docket 80–112, at 3 (September 29, 1980).

77. Many of the existing ITFS licensees claimed that the proposed plan would result in substantial reductions in the service they are now providing. For example the California Public Broadcasting Commission (CPBC) claimed that if the plan in the *Notice* were adopted "there would be a net loss of two-thirds of the channels now operating or imminent in Los Angeles, San Francisco and San Diego," and "that California's principal cities will face massive reductions in their present ITFS service . . . ." Comments of the California Public Broadcasting Commission, General Docket 80–112, at 7 (September 26, 1980). We are aware that these California cities represent areas of unusually heavy ITFS channel use, and that there is some validity to the concerns that our initial proposal could cause dislocations or additional expense.

78. On the basis of these considerations, we have reached the following conclusions regarding the reallocation plan in the *Notice*. Adjacent channel operation is technically feasible but it can only be implemented using transmission and reception equipment that is different from existing ITFS equipment. We believe implementation of the allocation plan in the *Notice* would be expensive and would put an undue financial burden on existing ITFS licensees.[25] Furthermore, the plan would be disruptive of many existing and planned ITFS systems. For these reasons and since we have concluded there are less disruptive methods to make spectrum available for MDS use, we have concluded that adoption of the allocation plan in the *Notice* would not be in the public interest.

79. The *Notice* also discussed other allocation plans. One was that each service be allocated specific channels within the band. We rejected that plan for two reasons. First, it required us to make predictions concerning the future needs of the services, a prediction we felt unable to make at the time. Second, we felt that such a plan would not be flexible enough to deal with regional variations in the number of channels required for the services. For these reasons, we proposed the primary allocation plan that allowed sharing of unused channels by the other two services. As articulated above, the voluminous record in this proceeding has enabled us to develop a better sense of the future growth of these services. It also has demonstrated that our concerns about regional variations were

[25] It is difficult to make precise estimates of the costs that would be incurred in converting existing ITFS systems to adjacent channels systems. It is likely that in most situations the existing transmitters would need to be replaced at a cost in excess of $100,000 per transmitter. It is also possible that existing downconverters would need to be replaced or modified. The total cost involved would be a function of the number of receiver sites and the cost per site could be several hundred dollars.

valid. There are wide regional variations in the use of both MDS and ITFS.

80. We also considered the alternative of unlimited sharing of the band by all three services. We rejected this plan because we believed it would be difficult to administer, especially if different technical rules were applied for each of the services sharing the band. After reviewing the record in this proceeding, we have also concluded as set out above, that such a plan would be contrary to the public interest in that it would not insure that some spectrum would continue to be reserved for potential ITFS applicants.

81. On the basis of these conclusions, we have reviewed the reallocation options available and have concluded that a plan that considers regional variations in spectrum use while at the same time reserving some channels for potential ITFS applicants would best serve the public interest. Several of those commenting in this proceeding also expressed the view that an allocation plan that reflected regional differences in spectrum use also made more sense than a uniform nationwide plan. *See* Comments of Oklahoma State Regents For Higher Education, General Docket 80–112 (June 16, 1980); Comments of C. Peter Magrath, President, University of Minnesota, General Docket 80–112, 3 (September 29, 1980); Comments of the State University of New York, General Docket 80–112, 4, (September 24, 1980).

82. We have considered various methods to take into account the regional variations in the demand for ITFS stations and multichannel MDS. One method suggested by President Magrath of the University of Minnesota was to hold local or regional public hearings to determine, *inter alia*, "the views of the community effected concerning the merits of the existing and proposed services." Comment of the University of Minnesota, General Docket 80–113 at 3 (September 5, 1980). Such public hearings could also be used to get accurate detailed information on the projected demand for ITFS channels and the demand for multichannel MDS for each area. We believe that holding such hearings would be a lengthy and expensive process, requiring a substantial amount of travel and administrative support. We do not believe that such a procedure is feasible and even if it were we do not believe that results obtained would be so substantially better than those obtained by other methods as to justify the expense and delay involved.

83. We have also considered reallocating channels to provide multichannel MDS only in those areas where there has been little or no use of the existing ITFS channels. Proceeding in this manner has two distinct disadvantages. First, it could involve the Commission in a protracted process to determine the boundaries of such areas. The only realistic way this could be done would be to wait until a multichannel application was received and then determine the ITFS channel use within a specified distance of the proposed MDS station.

Only after conducting such an analysis could we accurately determine ITFS channel use in the proposed MDS service area. Of course, we could require MDS applicants to include this analysis as a part of their applications. This would likely cause many existing and potential ITFS licensees to challenge the accuracy of the MDS applicant's analysis thereby involving the Commission staff in a series of contested proceedings. This would clearly delay the introduction of multichannel service in many areas.

84. The other difficulty with such a plan is that there would be little possibility of multichannel MDS in those metropolitan areas where the ITFS channels are extensively used. Thus, even where existing ITFS licensees were willing, or even desired, to transfer their license to an MDS operator, MDS operations would not be permissible.

85. The plan we have settled upon takes into consideration regional variations in ITFS channel use, "grandfathers" all existing ITFS licensees, permittees, and applicants and reallocates a specific set of channels for MDS use on a strict noninterference basis. The plan works as follows:

a. The E and F groups are reallocated for multichannel MDS use on a nationwide basis.

b. A multichannel MDS permittee will not be authorized to begin construction until it submits a statement from all existing cochannel and adjacent channel ITFS users with transmitters located within 50 miles of the new MDS station that the operation of the multichannel MDS station will not interfere with the ITFS operation or that the ITFS operator would accept any interference that did occur. This means that the MDS permittee is authorized to negotiate with existing cochannel and adjacent channel users of the ITFS channels to attempt to reach an accommodation whereby the needs of each can be satisfied. In those cases where there are no ITFS operators within 50 miles of the proposed MDS transmitter location that are using the authorized channels or any adjacent channels, the MDS permittee must so state.[26]

c. All ITFS licensees and permittees of, and applicants for, the channels as of the adoption date of this order will be grandfathered with rights of renewal. That is, all ITFS licensees of E or F group channels will be allowed to renew their licenses. Furthermore, all permittees of and applicants for either E or F group channels that ultimately obtain a license will be allowed to renew such licenses. No assignments, other than *pro forma* assignments of ITFS E or F group licenses, applications, or construction permits will be authorized.

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[26] We expect existing and potential ITFS operators to cooperate with MDS permittees in determining whether the operation of the MDS facilities will interfere with the ITFS operators. If the MDS permittee is not able, after making reasonable efforts, to obtain the desired statement from the ITFS operator it may submit evidence to the Commission on the issue of whether harmful interference will occur. The MDS permittee must also detail the efforts it made to obtain the desired statement and must serve a copy of all evidence submitted to the Commission to all affected ITFS operators. We expect such submissions to represent extraordinary cases.

d. No new ITFS applications for the E or the F group channels filed after adoption of this order will be accepted.

86. The elements of this plan have several advantages that other plans lack. Reallocating a specific set of channels on a nationwide basis means that in those areas where the reallocated channels are not being used, channels will be immediately available for multichannel MDS. It also creates at least the possibility that multichannel MDS will be available even in those areas where the reallocated channels are being used by ITFS service providers. It does this by granting conditioned construction permits for multichannel MDS in such areas and allowing the holders of these construction permits to negotiate with the existing cochannel and adjacent channel users to attempt to reach an accommodation whereby the requirements of both can be met.

87. We expect that such negotiations would consider, *inter alia*, the relocation of the existing ITFS users to other available ITFS channels, the use of frequency reuse techniques such as cross-polarization, site shielding and frequency offsets, and even the possibility of satisfying some of the communication requirements of the existing ITFS users in other areas of the spectrum. In this regard, we note that some members of the MDS community have argued that ITFS channel use is inefficient in the large metropolitan areas. For example, in its proposal, Microband claimed that many of the licensed ITFS channels were being used for point-to-point communication rather than for omnidirectional communication and concluded that, "[t]he significance of these point-to-point uses is that when intermixed with an intended omnidirectional use, they lead to a significant waste of spectrum." Microband Proposal, *supra*, Appendix H, at 6. In his first set of comments, Richard L. Vega, concluded that, "[i]n many cases, the ITFS authorized channel is for point-to-point microwave service thereby creating a wasteland of co-channel and adjacent channels over a relatively large geographical area due to the potential for harmful interference." Comments of Richard L. Vega, General Docket 80–112, at 2 (September 30, 1980). In many cases, the use of ITFS channels for point-to-point communications is complementary to point-to-multipoint or omnidirectional use in the same area. The point-to-point use of the ITFS channels is usually for studio to transmitter links (STLs). For example, under the proper set of circumstances, it could be possible to use one group of a pair of interleaved channel groups in an omnidirectional configuration and to use the other group as an STL in the same area. Furthermore, the use of an ITFS channel group for point-to-point communications allows the ITFS operator to use simpler and less expensive equipment than would be required by conventional point-to-point service. Finally, of course, such use is specifically provided for in Section 74.931(d) of the Rules, 47 C.F.R. § 74.931(d). We do believe, however, that it may be possible to accommodate such users in other portions

of the spectrum. In regard to these negotiations, we would expect the multichannel MDS permittee to give reasonable compensation for any dislocations caused by the operation of its facilities.

88. Another advantage to reallocating a specific set of channels and requiring an agreement prior to construction of the multichannel facilities is that it is easy to administer. This is in a sense a double advantage. It makes it easier for applicants to file acceptable applications and it makes it easier for the staff to review the applications. Under this plan, an applicant is not required to conduct an interference analysis until after he has received an authorization. Thus, all applicants are expected to comply with all pertinent Sections of Part 21 including those we are adopting today except that they are not required to show non-interference with existing and proposed cochannel and adjacent channel ITFS users of the reallocated channels until after a construction permit has been granted. This procedure will save unsuccessful applicants the time and expense required to prepare such analysis and it will save the staff the time required to review each analysis submitted. Furthermore, we expect that the analyses that are submitted by permittees will be of a much higher quality than those submitted by applicants. Another administrative advantage is that under all of the other plans considered it may have been necessary to freeze the acceptance of all further ITFS applications for some period time. This plan does not require such a procedure because it does not change the application process for the twenty channels still allocated for ITFS use.

89. A final advantage to a uniform nationwide allocation for multichannel MDS is that it avoids, to the greatest extent possible, disrupting the authorized satellite use of the 2500–2690 MHz band. The use of the band by the broadcast satellite service is limited domestically "to domestic and regional systems for community reception of educational television programming and public service information." 47 C.F.R. § 2.106, n. NG 101. The bands 2500–2535 MHz (space to earth) and 2655–2690 MHz (earth to space) are also shared with the fixed satellite service for common carrier use in Alaska and certain areas in the Western Pacific and in the contiguous United States, Alaska and the Mid and Western Pacific areas for education use. 47 C.F.R. § 2.106, n. NG 102.

90. Several of those filing comments in this proceeding suggested that if we were to reallocate spectrum from the ITFS use to the MDS use we would reduce the possibility of any satellite service sharing the band.

91. The shared use of the band by terrestrial and satellite services poses two distinct problems. First, the broadcast satellite transmissions can interfere with the reception of terrestrial signals. In general, this would be a problem for any terrestrial service, but it could be more of a problem for MDS than for ITFS users because of

the receiving antennas used. ITFS receiver sites generally are equipped with higher gain and hence more directional antennas than MDS receiver sites. The latter in many cases use low gain less directional antennas that are much more likely to pick up interfering signals from satellites than are the higher gain ITFS antennas. The Corporation for Public Broadcasting submitted an extensive analysis of the impact of sharing this band between terrestrial and satellite users that indicated that terrestrial ITFS users could coexist with satellite users. CPB was unwilling to extend this analysis to include MDS because of the antenna differences. Comments of the Corporation for Public Broadcasting, *supra.*, at 31, 32.

92. Terrestrial transmissions in the shared band can interfere with the reception of the satellite signal by nearby earth stations. Here also CPB claimed that the sharing of the band between ITFS and the satellite service was possible but it was again unwilling to extend its analysis to the MDS sharing. CPB claimed that the studies that it presented for ITFS sharing were not valid for MDS because MDS uses omnidirectional antennas and higher power whereas many ITFS stations use directional antennas and lower power transmitters. *Id.* The argument is that terrestrial transmitters of whatever kind create "holes" where no frequency sharing satellite receive stations can be located and that MDS transmitting stations create larger "holes" than ITFS. We agree. However, others have argued that the creation of such holes should not be used as a justification for precluding terrestrial operation in the same band. The Public Service Satellite Consortium (PSSC) commented as follows:

> PSSC respectfully urges that limiting the development of 2.5 GHz terrestrial distribution, by claiming that it limits potential satellite distribution in the same band, is not sufficiently strong justification for such action. To limit the developmental potential which 2.5 GHz terrestrial distribution service has, by claiming that such terrestrial distribution causes interference "holes" in potential satellite coverage in this same band, has few merits when the potentials are viewed together. It is true that "holes" would be made in satellite coverage in the presence of local ITFS (or other uses of the 2500 to 2690 MHz band), and that satellite earth stations in this band would require careful placement or other precautions to avoid being interfered with. But to limit development of terrestrial networks, which have at least an order of magnitude of more program capacity and flexibility, would be unwise. The total variety of potential programs which could be distributed via satellite on these frequencies is relatively small. In contrast, the variety of programming which could be aired terrestrially within the same band, is about five to six programs for each location where terrestrial transmitters can be coordinated. This would represent thousands of program possibilities which could be tailored to local or regional needs.
>
> Another consideration which should be recognized as a factor in this argument relates to the demographic distribution of potential "holes" in satellite coverage. If an assumption is made that a local entity wants to receive a satellite-distributed public service or instructional program, and can point its antenna to one of five or six satellites to receive it, it could do it. But if the program content did not match its needs for programming, either generally or at that particular time, it would probably choose from alternative sources. This is where the demographic distribution enters in.

The more densely a city or region is populated, the more likely it will be that diverse programs are available to the public, and therefore less likely that a small selection of nationally distributed material will be useful. Where the satellite-distributed material will be most useful is in the more rural areas of the country where alternatives are not as plentiful.

Carrying the argument further, rural areas are not as likely to have as great economic justification for installing ITFS transmitters as the more populated regions would have. In rural areas, low-cost satellite receivers installed to serve small towns, and having local signal distribution via low-power VHF or UHF transmitters, would seem to fit the need best. Terrestrial distribution at 2.5 GHz band frequencies would not be justifiable for individual users who would have to invest in additional receiving equipment to get the programs. Simplistically then, there would be no interference "holes" in satellite beam coverage, where such coverage is most appropriate-in areas where terrestrial distribution at these frequencies is less appropriate and economical.

Comments of the Public Service Satellite Consortium, General Docket 80–113, at 8–10 (Sept. 2, 1980) incorporated by reference in Comments of the Public Service Satellite Consortium, General Docket 80–112, at 4 (September 2, 1980). Perhaps more important in this regard is the fact that we are not aware of any existing plans to construct a public service satellite using this band. Many of those that used the ATS-6 satellite that operated in this band are now leasing transponders from existing satellite communications providers that operate in a different band.

93. The National Aeronautics and Space Administration (NASA) has indicated that it is exploring the use of this band to provide what it terms "feeder links" to provide communications between a "satellite and fixed earth stations, to facilitate interconnection of a mobile satellite service with the terrestrial telephone network". Further Comments of the National Aeronautics and Space Administration, General Dockets 80–112 and 80–113, at 2, 3 (July 2, 1982). NASA is proposing to use the 806–890 MHz band to communicate between a mobile user and a satellite and to use the feeder link to communicate from the satellite back to the feeder link earth station. This would allow for the extension of mobile telephone service to users beyond the range of planned terrestrial networks. NASA has proposed to use the 2500–2535 MHz for the space to earth segment and the 2655–2690 MHz band for the earth to space segment of the feeder links. NASA's proposal is not an allowed use under the existing table allocation and thus would require a separate rulemaking proceeding before it could be implemented.[27] In light of its plan, NASA suggests that any additional use of the 2500–2690 MHz by terrestrial users would make sharing of the band by satellite users more difficult.

94. Reallocating specific groups of ITFS channels for MDS would mitigate the problems pointed out by CPB and NASA and would move in the direction suggested by PSSC. Allocating a specific set of

[27] On November 29, 1982 NASA filed a Petition for Rulemaking in which it formally proposed, *inter alia*, that this band be made available for this purpose.

channels for MDS use would mean that any future public service satellite use of this band could be structured to avoid sharing the MDS frequencies. Thus, the analysis presented by CPB would be valid in most of the band. Further, the use of the frequencies NASA proposed for its feeder links could also be avoided. Of course, proceeding in this manner will increase the use of the channels that remain available to ITFS but if the CPB analysis is correct, and ITFS use of these is much less inimical to sharing of the band than is MDS use, sharing can still be accommodated.

95. Grandfathering all existing licensees and permittees of and applicants for the reallocated channels accounts for regional variations in ITFS channel use without extensive Commission involvement or analysis. It does not require any existing ITFS licensees, permittees or applicants to alter planned or present use of their authorizations. Where the channels are not being used multichannel MDS applicants have immediate access to the channels,[28] and where the channels are licensed or applied for MDS operations cannot commence without negotiations with affected ITFS entities.

96. The final element of the plan we are adopting—not accepting any ITFS applications for the reallocated spectrum after adoption of this order—is necessary in order to keep the reallocated channels available for multichannel MDS and to avoid having mutually exclusive, fundamentally different applicants for the same channel. In most cases, the would-be ITFS applicants will be able to be accomodated in the 20 channels that will continue to be available for ITFS.

97. On the basis of this analysis, we have concluded this plan strikes a reasonable balance between the need to continue to make spectrum available for traditional ITFS users and, at the same time, makes spectrum available for multichannel MDS. It does so by minimizing the disruption to the plans of existing ITFS licensees, permittees, or applicants. It is easy to administer and provides at least the possibility of multichannel MDS on a nationwide basis. It

[28] It could be argued that if the reallocated channels were the only channels not used in a particular area, and if an applicant were just about to file for these channels, such an applicant would be left with nowhere to apply. We believe that such occurrences will be rare and when they do occur it may be possible to reuse some of the 20 channels that will continue to be available for ITFS use to satisfy the needs of the would-be applicant. Furthermore, in regard to frequency reuse, we have recently been furnished data that indicate there is extensive frequency reuse in several of the large metropolitan areas where ITFS use is heavy. For example, in New York 19 of the 27 authorized channels are reused at least once; in Los Angeles 24 of the 28 authorized channels are reused at least once; in San Francisco 10 of the 26 authorized channels are reused at least once; and in Boston 14 of the 26 authorized channels are reused at least once. "Letter from Victor E. Ferrall, Jr." General Docket Nos. 80–112 and 80–113, attachment titled "ITFS Channel Utilization in the Top 25 Markets," (May 4, 1983). The letter and the data attached thereto are hereby accepted as informal comments in this proceeding.

also preserves, to the greatest extent possible, the future satellite use of this band.

98. We now address the question of how many channels to reallocate for multichannel MDS. This question really involves three separate questions. First, how many channels constitute a viable multichannel MDS system? Second, how many multichannel systems should be provided for in each market? Third, how many channels should be kept in reserve for ITFS use?

99. The existing MDS rules do not allow MDS licensees to operate even a two channel system. Specifically Section 21.901(d), 47 C.F.R. § 21.901(d), precludes an existing licensee from applying for at least one year and even then it must show that there is a public demand for additional service that is unlikely to be satisfied by a competing carrier. The new rules proposed in the *Notice* did not contain this restriction. However, the proposed repeal of the section was not discussed in the *Notice* and we did not receive much comment on it in the first set of comments filed in this proceeding. Virtually all the MDS entities that filed reply comments in response to the Microband Proposal strongly supported the concept of multichannel MDS. Microband itself also noted that the existing restrictions "for all practical purpose, limit carriers to a single channel in any one market," because "it is virtually impossible for MDS carriers to prove a negative—that no other carrier is likely to provide service." Microband Proposal, *supra* at 38, and 39. n. 48. In its filing, Contemporary Communications Corporation (CCC) argued strongly for multiple channel MDS. CCC claimed that:

> For both technical and economic reasons, the public would be better served by a single entity operating multiple channels, as opposed to many operators, each limited to one channel. Studies have shown that if multiple channels are to be provided to subscribers, careful control must be exercised over the transmitting parameters of the channels. In particular, for best operation, transmitting locations should be the same. Even better operation will result if common transmitting antennas are used. To achieve satisfactory reception, relative frequencies of the several transmitters must be controlled with respect to one another, to a degree much finer than that required for a single channel. Power levels must also be related among the several transmitters, transmission lines, and transmitting antennas if interference is to be reduced. In sum, only a single operator can insure efficient operation of a multiple channel system.
>
> In addition to technical operating factors, economic factors also support common ownership of multiple channels. Common transmission line (often costing as much as $25 per foot) and common antennas, costing thousands of dollars, can be utilized for multiple channels if there is only one operator. Rent can be reduced, since only one antenna would be employed, and multiple equipment can be operated in the same room, thereby decreasing the total floor space, as compared to a multiplicity of rooms that might be required for multiple operators. Common maintenance personnel can also reduce the maintenance cost per channel. Further, the number of spare parts needed by a single operator of multiple channels is obviously less than the number required by separate operators each operating one channel. Even electricity costs will be less for multiple channel operations.

Additional Comments of CCC, *supra* at 7–8.

100. Of course, it is possible to have multichannel MDS systems where each of the channels is licensed to a different carrier. As mentioned earlier, this is the situation in Phoenix where Microband and Contemporary are the carriers and both have the same customer, American Cable Television, offering two-tier programming with the two channels. We believe that for technical reasons, this is probably the only way a two-channel operation will be achieved under the existing rules. Allocating a single channel to each licensee has done little to promote diversity of ownership, and has the significant detriments of increased system complexity, cost, and regulatory delays in providing service to the public. The increased complexity and costs result from the factors listed by CCC in its comments. In a service where the licensee is not permitted to exercise program control the benefits of diversity are less pronounced than they might be where the licensee controls the material transmitted. Although diversity may lead to competition in such things as quality of service, allocating a single channel to each carrier means that there will likely be a comparative hearing for each channel as compared to a single hearing for a multiple channel application. For these reasons, we have concluded that there is no reason to continue to limit MDS carriers to a single channel operation and that the public interest would be better served by the repeal of the single channel limitation contained in Section 21.901(d) of the rules.

101. Given that multichannel MDS operation will benefit the public interest, we must address the question of how many channels should be in each system. In its proposal Microband suggested that a five channel system was optimum. It based this conclusion on an analysis that showed that "four channels of Pay TV will satisfy 85% of consumer demand." It thus concluded a multichannel system should consist of "four video channels plus a data channel." Microband Proposal, *supra*, at 48. Another commenter, Tekkom, suggested that 10 channels per system would be in the public interest. Comments of Tekkom, Inc., General Dockets 80–112 and 80–113, 11 (June 28, 1982). CBS, on the other hand, argued that the demand in each market should determine the number of channels in multichannel systems. CBS Comments on the Microband Proposal for Multichannel MDS Service, General Dockets 80–112 and 80–113, at 10 (July 1, 1982). We agree with CBS's claim that there may be regional variations in the number of channels that would be optimum in a multichannel system. On the other hand, we recognize that we are making this reallocation from a band that is divided into four channel groups and that four channel systems would, therefore, be less disruptive of the existing scheme. Also the Microband analysis suggested that 4 channels would satisfy nearly all the consumer demand for premium channels. Furthermore, the fact that

MDS is a common carrier service means that market forces will still play a part in determining how users acquire the channels and offer services to the public. Depending on the particular market conditions, a licensee may find it desirable, in a system of carrier initiated tariffs, to offer channels in a variety of different ways. *See e.g., Metrock Corporation*, 73 FCC 2d 802 (1979). This variety would reflect the particular needs and desire of users in different areas. Not only may the terms of the offering of channels vary, but also the uses to which they are put may vary. For example, although it appears the channels will at least initially be used for the distribution of premium television programming, our rules permit "any kind of communications service consistent with the Commission's Rules . . .." 47 C.F.R. § 21.903. For these reasons, we have concluded that authorizing 4 channel MDS systems serves the public interest.

102. We also recognize that it is possible that the same entity could lease all of the capacity of each common carrier, thereby, precluding others from becoming MDS programmers. Since the public only deals with the customers of the common carrier — and not the common carrier itself — the public could be forced to deal with a single multichannel MDS provider. We have considered requiring multichannel MDS licensees to so tariff their service that such an eventuality could not occur. We have decided not to adopt such a requirement for several reasons. First, we believe that the fact that an entity desiring to lease all available MDS channels will be required to deal with two common carriers somewhat reduces the possibility this will occur. Furthermore, since we are also by this order allowing ITFS licensees to lease excess capacity in their facilities, it is possible that an entity that wishes to provide premium television service to the public could do so using such excess capacity. It is also possible that in many areas, the public will be offered a choice between multichannel MDS and cable. Finally, we believe that restricting MDS tariffs would prevent market forces from determining the optimum mix of channels. Adopting such a requirement would create an artificial upper limit on the maximum number of channels a single entity could program.

103. Finally, we must address the related questions of how many channels to reallocate for MDS and how many channels to hold in reserve for future growth in ITFS. What we must do here is balance the need to make a reasonable number of multichannel MDS systems available with the need to ensure that an adequate number of channels are available for future ITFS growth.

104. In its proposal, Microband suggested that we reallocate three full ITFS groups or twelve channels for MDS use. Microband Proposal, *supra*, at 33. Microband claims to have based this suggestion on its analysis of the potential number of customers for multichannel MDS service in the top 50 markets. Microband did not submit any analysis to support its suggestion. It did present data on

the number of potential multichannel MDS customers in the top 50 market but it did not relate this data to the number of competitive MDS systems that would be optimum or even reasonable. The data presented show that on the average, there are 1,770,800 potential multichannel MDS subscribers in the top 5 markets and 70,400 in markets 46 through 50. Microband took these figures and divided each by 18,000, the break even number of subscribers for a multichannel system, to produce what it called a coverage ratio. What this figure purports to represent is the number of systems that could reach a financial break even point if all the potential customers were to subscribe to a single service and if each of the competing services were to have an equal share of the available customers. The coverage ratio for the top 5 markets was 98.4 and the coverage ratio for markets 46–50 was 3.9. All that the Microband data really show is that there are potential customers for multichannel MDS systems. We believe that there are factors other than the number of homes not passed by cable that will determine the number of multichannel MDS systems that can profitably serve an area. These include the nature and quality of the programming available, the quality of signal that can be delivered, the availability of competitive services, the price of the service, and the discretionary income of the residents of the area. These factors may combine in one area in such a way that only one MDS system can be profitable and in another area in such a way that 3 or more systems could be profitable.

105. Consideration of all these factors does not lead to clear choice for the number of multichannel systems that should be authorized in each area. However, it does appear that in many large areas at least two systems could be viable. Moreover, authorization of more than one system should provide a number of public interest benefits. Competition between competing systems could stimulate technological innovation, could increase systems availability and could also make lower cost service available to the public. We also believe that we should continue to hold a substantial amount of spectrum in reserve for ITFS use. For these reasons, we have concluded that we should make two groups of ITFS channels available for multichannel MDS. This will allow two competitive MDS operators to offer multichannel service in those areas and will keep 20 channels in reserve for existing and future ITFS use.[29]

106. Another issue to be resolved is what channels to reallocate. In its proposal, Microband suggested that the E, F and G groups be reallocated for MDS use. It based this recommendation on its conclusion that these were the bands least used by ITFS licensees. We do not agree. Our records show that the distribution of ITFS

[29] Each applicant will only be allowed to file a single multi-channel application in each service area.

licenses among groups is as follows: A group-225, B group-93, C group-128, D group-82, E group-112, F group-91, and G group-113. Thus, it would appear that except for the A-B group, use of the interleaved ITFS frequency groups is about the same. It should also be noted that the A, C and E groups are significantly more used than the groups with which they are interleaved. This is to be expected because the use of channels in one pair of an interleaved group tends to preclude use of the other group in the same area. Because the interleaved ITFS group use does not vary significantly by group except for the A-B group, we must look to other criteria to select the group to assign to MDS.

107. The most important factor in selecting the groups to be reallocated is minimum interference to the remaining ITFS licensees. This means that we should reallocate an interleaved pair of groups. Proceeding in this manner will result in only two ITFS channels being adjacent to MDS channels. Choosing non-interleaved groups could result in there being as many as 9 ITFS channels adjacent to MDS channels. We also believe that we should avoid reallocating either the group of channels that share the band (2500–2535 MHz and 2665–2690 MHz) that NASA is proposing to use for its feeder link operation so as not to jeopardize consideration of that proposal. This eliminates the A-B pair and G group. This reduces the choice to either the C-D pair or the E-F pair. We also believe that it would be useful to leave the widest possible contiguous band available for ITFS because this would result in the largest possible contiguous bandwidth being left available for shared use by ITFS and Public Service satellite use. This means that if there is a public service satellite use of this band, it would be shared with only ITFS over the largest possible contiguous band. For these reasons, we have concluded that the best pair of channels to reallocate for MDS are the E and F groups.

108. Finally, we must address the question of how to divide the eight channels in the E and F groups between the two MDS operators licensed. We could follow the ITFS assignment method discussed above and assign the 4 channel E group to one licensee and the 4 channel F group to the other licensee. Proceeding in this manner has the advantage of allowing the use of simpler transmitters and downconversion equipment, but it has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators were not colocated. We could also authorize each operator to use 4 adjacent channels; that is assign channels E1, F1, E2, F2 to one operator and channels E3, F3, E4, F4 to the other operator. Thus, there would only be one pair of adjacent channel F2 and E3. Of course with either method, channel E1 will be adjacent to ITFS channel D4 and channel F4 will be adjacent to ITFS channel G1, both of which may be in use in the area where the MDS channels are being authorized. Thus, by licensing adjacent channels

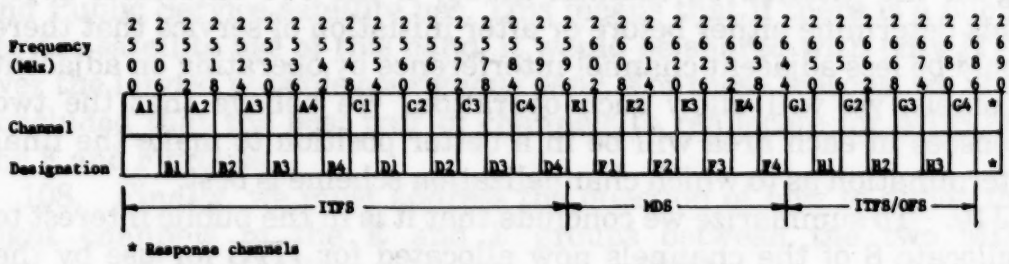
to the same operator, we would be leaving the possibility of adjacent channel interference with existing ITFS stations unchanged and would be eliminating most of the non-colocated adjacent operation from the reallocated spectrum. This could require that the multichannel operators use more complicated transmission and reception equipment.

109. We did not address this issue extensively in the companion *Notice*, and, although we did not receive much comment on it in response to the companion *Notice*, some of those commenting on the Microband proposal did address the issue. One commenter, the Microwave Communications Association (MCA), noted that because we did not specifically propose rules for multichannel operation, we would be required to do so in the future. MCA further expressed the view that "this is fortuitous, because it will permit the Commission to consider multichannel systems' operating experience. Actual operating experience is clearly preferable to a lengthy technical rulemaking based only upon theoretical calculations." Comments of MCA, *supra*, at 9. There is some validity to MCA's claim; however, we cannot reallocate spectrum without specifying what channels are available for each applicant.[30] For this reason, we have concluded that the best course to follow is to have each applicant apply for a four channel MDS authorization using the interleaved channel plan now used by ITFS licensees. We also will require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group. If the two successful applicants determine either before or after initiation of service that there would be less adjacent channel interference by operating on adjacent channels, we will allow such operation. We believe that the two licensees in each area will be in a better position to make the final determination as to which channelization scheme is best.

110. To summarize we conclude that it is in the public interest to reallocate 8 of the channels now allocated for ITFS for use by the MDS nationally. Existing ITFS licensees (as well as existing permittees and applicants that eventually become licensees) of the reallocated channels would be grandfathered in perpetuity. Further, we have concluded that reallocating the E and F groups for MDS use would be least disruptive of the existing and potential uses of the 2500–2690 MHz band. We will accept applications for multichannel MDS in all areas of the country regardless of whether the reallocated channels have been previously applied for by an ITFS applicant. In those situations where there is an existing ITFS licensee, permittee, or applicant we shall issue multichannel MDS construction permits

[30] We will apply existing technical rules to multichannel MDS. We expect to adopt new technical rules for MDS prior to or shortly after the authorization of the first multichannel MDS station. (*See* Note 1, *supra*).

conditioned on the permittee obtaining, prior to commencing construction, a statement from each adjacent channel and cochannel ITFS licensee, permittee, or applicant whose transmitter is located within 50 miles of the proposed MDS transmitter site, that the operation of the MDS facility will not cause harmful interference to the ITFS operation or if it does the ITFS operator will accept the interference. We expect that the MDS permittees and the ITFS users of the reallocated channels will negotiate in good faith to mutually accommodate each others' communications requirements. We believe that this process will be beneficial to all concerned. The MDS permittees will be able to offer a potentially profitable new communications service to the public. Existing ITFS users of the reallocated spectrum may end up with better and more efficient communication facilities at no expense, will most likely benefit from technical expertise of the commercial users of the band and will likely benefit from the decreased costs of equipment that will result from the partial commercial exploitation of the band. Finally, the public will benefit from the more efficient use of a valuable national resource, the electromagnetic spectrum. We recognize that there may be some large cities in which no reallocation will occur despite the steps we take today. It is likely in those areas in which this plan does not make multichannel MDS available there will be alternative means available by which the public will be able to obtain multichannel MDS including leasing the excess capacity of existing ITFS channels. The following chart illustrates the channel plan we are adopting.



D. *Time Sharing and Leasing*

111. In the *Notice*, we invited comments on the "technical and practical feasibility" of permitting ITFS stations to share unused transmission time with MDS users. We stated that because most educational use occurs during daytime hours while entertainment television occurs in the evening, sharing appeared to be practical. Three forms of sharing were discussed: separate station facilities sharing the same frequency, jointly licensed facilities, and lease of unused transmission time by ITFS licensees. We also asked whether sharing ought to be mandated. *Notice, supra*, at para. 51.

112. Several ITFS entities accepted our invitation and submitted comments on time sharing of the ITFS channels. Most of the

comments received were not favorable. For example, the Joint Council on Educational Telecommunications commented that colleges, universities and hospitals use their channels in evening hours and on weekends, and that entertainment programming often is transmitted on a 24-hour basis. Comment of the Joint Council on Educational Telecommunications, General Docket 80–112, at 5–6 (September 29, 1980). The National Education Association (NEA) reiterated the concerns of JCET and added that sharing is not feasible for other reasons. For example, it stated that ITFS systems are configured to reach designated educational sites while MDS systems that are used to transmit pay television are configured to reach the greatest population possible. Comments of the National Education Association, General Docket 80–112, at 6–7 (September 25, 1980).

113. Several others raised another reason why time-sharing is not feasible. In its comments, the Archdiocese of Los Angeles made the following observations:

> "Education has for its object the formation of character". Under the second and third Commission sharing schemes, ITFS licensees would lose control over the content of certain transmissions from their facilities. Much of the programming being broadcast today via MDS is considered by many people to be objectionable—even, at times, pornographic. Proposals for construction of new ITFS facilities, and continued funding of present stations, will likely meet strong opposition from university regents, local boards of education, private institutions and concerned parent-teacher groups if they are placed in the position of having to purvey material which they consider disconsonant with their responsibilities as educators. Thus, these sharing schemes could discourage further ITFS growth—and perhaps result in a reduction of the present number of stations.
>
> Indeed, the Los Angeles Archdiocese is totally opposed to imposition of either of the latter sharing schemes. The Archdiocese would be forced into a difficult moral decision if it faced the prospect of its facilities being used for the transmission of programming which it considered offensive to Catholic values. If the Archdiocese lacked the ability to discriminate as to users of its facilities, it might well have to decide to give up its station altogether so as to avoid becoming party to transmissions contrary to the mission of the Church.

Comment of the Archdioceses of Los Angeles, General Docket 80–112, at 14–15 (September 26, 1980) (footnote omitted) (quoting Herbert Spencer, *Social Statistics*, pt. 1 ch. 2(1851)).

114. We agree with the majority of commenters who oppose any requirement that ITFS licensees share or lease their excess channel capacity. Contrary to the belief of those commenters, however, we believe that it is in the public interest to *permit* ITFS licensees to lease their excess channel capacity. The decision to lease excess capacity thus remains entirely up to the individual ITFS licensee. As a result of the current decrease in federal funding for ITFS, we believe it is appropriate to modify our rules to permit ITFS operators

to generate revenues by using their excess capacity for a variety of non-ITFS purposes.[31] As the excess capacity of ITFS operators is put to use serving the public, greater use of the available spectrum should result.[32]

115. We think that the changes that we are making today are appropriate for two basic reasons. First, the cost of constructing and operating an ITFS system represents a significant burden to licensees. In addition, the cost of education is increasing daily. ITFS provides a low-cost alternative to specialized instruction, adult education and other instructional modes. However, new revenue sources are necessary in order to give ITFS every chance to grow and succeed. Second, increased interest has been generated in the ITFS band including demand for broader use of the spectrum.

116. Thus, substantial benefits to the public may be derived from allowing ITFS licensees to use excess channel capacity, either by directly utilizing it themselves or through leasing it to others. The income derived from such service could enable stations to be on the air for a greater portion of the day and to increase programming availability. In addition, new revenues might prove sufficient to bring currently vacant channels on the air.

117. Increased revenue would widen ITFS' base of support and contribute to the service's ability to withstand a diminution in any one source of funding without being forced to significantly reduce its overall service to the community. If federal government funding declines, the success of licensees in recouping at least part of the loss may be crucial to ITFS growth and development. The option licensees have to lease excess ITFS channel capacity is consistent with several recent actions taken by the Commission. The Commission amended Part 74 of its rules to permit the shared use of broadcast auxiliary facilities with other broadcast and non-broadcast entities.[33] It also recently has authorized non-broadcast uses of non-main channel operations, such as teletext and FM subcarriers.[34] We are adopting policies in this proceeding for leased uses of ITFS excess channel capacity that are consistent with the decisions in the Part 74, teletext and FM subcarrier rule proceedings.

118. Therefore, we are amending Part 74 to permit use of

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[31] The Public Broadcasting Amendments Act of 1981 (Public Law (97–35) Section f(a)).

[32] The Commission today is also adopting a *Notice of Proposed Rule Making* that would further assist ITFS licensees in their operations. *See* Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service, FCC 83–244, (adopted) May 26, 1983.

[33] 48 Fed. Reg. 17081 (April 21, 1983).

[34] *See* Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, *Report and Order* in BC Docket No. 81–741, adopted March 24, 1983; and Amendments of Parts 2 and 73 of the Commission's Rules Concerning the Use of Subsidiary Communications Authorizations, *Report and Order* in BC Docket No. 82–536, adopted April 7, 1983.

facilities by ITFS licensees for non-ITFS purposes. This authorization includes use of the ITFS station's main broadcast channel and the use of non-main channel excess capacity including subcarriers and the vertical blanking interval (VBI). Furthermore, licensees are permitted to make this excess capacity available to others, if they so choose, on a profit-making basis. We will not, at this time, adopt specific time limitations on non-ITFS use of licensee excess channel capacity. By declining to specify any such limitations, we hope to maximize the spectrum efficiencies that shared use will provide. This will also afford ITFS licensees flexibility in offering their excess capacity to other entities. However, we do expect ITFS licensees to utilize each of their ITFS main channels substantially for legitimate ITFS use. Since we cannot anticipate in advance how much time is required for each licensee to address its ITFS needs, we do not wish to force ITFS channels to remain idle when other legitimate demands for the channels exist. Such an outcome is precisely the situation that we are attempting to avoid by allowing shared use of the channels. This policy is consistent with action taken by the Commission in amendment of Part 74, Subpart F of the Commission's Rules to permit shared use of broadcast auxiliary facilities with other broadcast and non-broadcast entities, 48 Fed. Reg. 17081 (published April 21, 1983). As in the proceedings discussed above, if ITFS licensees do make excess capacity available, the question arises as to whether the licensee is engaging in common carrier activity. After briefly explaining the legal requirements under which we must decide the common carriage issue, we shall apply those requirements to the two types of excess capacity at issue, in turn, below.

119. In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir), *cert. denied* 425 U.S. 992 (1976) (*NARUC I*), the court specifically stated that a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. 525 F.2d at 641. The court continued, moreover, that the distinction between common and private carriers was not based on the services offered or the clientele served, but rather on "the manner and terms by which they approach and deal with their customers." Id. at 642. The court then stated that in determining whether a particular carrier should be accorded common carrier status, a finding must be made as to whether any legal compulsion to serve indifferently exists, or whether there are reasons implicit in the nature of the operation to expect an indifferent holding out.

120. With respect to leasing of the main ITFS channel, we see no reason to require ITFS licensees who engage in such leasing to be common carriers. One purpose of this proceeding is to make unused channels in the 2500–2690 MHz band available for use on a common carrier basis. We are reallocating channels from ITFS to MDS to

serve this purpose, and we believe experience with the reallocation is necessary before we take an additional step and find the need for common carrier channels is so great that all excess capacity should be offered on that basis. Moreover, the requirements of Title II may well discourage or inhibit ITFS licensees from making spare capacity available, if they could only do so as common carriers. For these reasons, we will not require that spare capacity on the main channel be leased on a common carrier basis.

121. With respect to the second test for classifying common carriers, whether there are reasons implicit in the nature of the operation to expect an indifferent holding out, we believe that main channel leasing should not, at least initially, be considered a common carrier activity. Our reasoning closely parallels the decision recently adopted in BC Docket No. 81–794, in which we stated that the selling of excess capacity on television broadcast auxiliary stations would not be treated as common carriage. *Shared Use of Broadcast Auxiliary Facilities*, 48 Fed. Reg. 17081 (April 21, 1983). We believe ITFS will not engage in a generalized holding out of their excess capacity, but instead will carefully select lessees for long-term contracts. The comments demonstrate that licensed facilities do not readily lend themselves to widespread MDS use. They have been tailored to the particular requirements of the licensee, and, if they do lend themselves to use by another, careful coordination will be necessary. The licensee also must consider its own growth requirements, and likely will limit the availability of the excess capacity so it will be able to use the facilities for its own primary purpose when the need arises. Individual contractual arrangements would better serve this purpose than would a general offer to deal with the public indiscriminately. This individualized selection of clients due to the need to protect the licensee's own use of the facilities was one factor, thought by the court in *NARUC I* to be inconsistent with common carrier status. 525 F.2d at 642. We find nothing inherent in the potential leasing activities of ITFS licensees that would lead them to make indifferent offerings of excess capacity on the main channel. Accordingly, we do not believe that ITFS licensees will act as common carriers.[35]

122. We recognize that permitting ITFS licensees to lease their main channels for other than traditional ITFS purposes may effectively result in a diminution of the channels reserved for traditional purposes, but we believe this risk is acceptable. First, only excess capacity may be leased. We presume the channels were obtained, and are primarily utilized for, satisfying a legitimate ITFS

[35] If our initial analysis is incorrect, and ITFS licensees do in fact begin offering main channel excess capacity on an indifferent basis, it would be incumbent on the Commission to determine the extent to which traditional Title II regulation should be applied. *See NARUC I at 644; Shared Use of Auxiliary Broadcast Facilities at para. 26.*

requirement. Because these requirements appear to be increasing in a number of areas, we presume the traditional uses will continue. Second, the pleadings indicate, if anything, a reluctance on the part of licensees to engage in any form of sharing. Finally, any wholesale abandonment of the primary purpose of the facility could jeopardize the entity's license.

123. Just as we find ITFS main channel sharing analogous to our recent Broadcast Auxiliary proceeding, 48 Fed. Reg. 17081 (April 21, 1983), we believe that the regulatory status of subcarrier and VBI leasing can be resolved in essentially the same manner as in the recently adopted FM-SCA and Teletext decisions.

124. Depending on the nature of the information disseminated via an ITFS station's subcarriers or VBI, the regulatory status accorded the service may vary. As noted in the FM-SCA *Report and Order*, the provision of "broadcast-related services on subchannels is well established and does not raise any new issues of appropriate regulation". Thus, so long as the services provided over the station's subcarriers or VBI are broadcast related, no extraordinary regulatory treatment will attach to the profit-making activity.

125. However, other subchannel or VBI uses may be similar to services being provided by licensees in the private radio or common carrier services. To the extent that services offered via ITFS facilities are private radio or common carrier services, these ITFS-delivered services will be treated in the same manner, and with all the same benefits, obligations and responsibilities as the providers of similar services. Thus, with regard to non-broadcast related uses of the ITFS station's subcarriers and VBI, it will be necessary to determine whether the service offered constitutes private or common carriage under *NARUC* I and applicable statutes.

126. With one exception, the determination as to whether a particular non-broadcast service offered on an ITFS subchannel or VBI is private or common carriage will be made in accordance with the guidance given in *NARUC I*, as discussed above. Essentially, if the ITFS operator indiscriminately offers the station's subcarriers and VBI to other users, the operator will be regarded as a common carrier and will be treated accordingly. If, on the other hand, the licensee does not engage in an indiscriminate holding out, common carrier obligations will not attach and private carriage rules will apply. The one exception to utilizing the *NARUC I* test involves land mobile services.

127. With regard to land mobile services, the Communications Amendments Act of 1982, Section 120, establishes a demarcation between private and common carrier land mobile services, and indicates that the test contained in the new Section 331(c) of the Communications Act is intended to supersede the *NARUC I* standard. Public Law No. 97–259, 96 Stat. 1087. We believe that the test in the new legislation would apply to some of the communications

services that could be offered on ITFS subchannels or the VBI. The Act defines a "Mobile Service" as . . . a radio communication service carried on between mobile stations or receivers and land stations, ..., and includes both one-way and two-way radio communication services." Public Law 97–259 at Section 120(b)(2), 96 Stat 1097, 47 U.S.C. 153(n). It is clear that potential ITFS subchannel and VBI services such as paging would therefore be governed by the new legislation, and such services will be judged by the test in the new Section 331(c). The new statutory test is based on the manner in which a multiple licensed or shared private land station is interconnected with a telephone exchange or interexchange service or facility.[36] *See also* H.R. Rep. No. 765, 97th Congress, 2nd Session, pp. 52–56 (1082).[37] The statute also makes it clear that if it is a private system, it is exempt from state and local regulation. 47 U.S.C. 331(c)(3).

128. Once an ITFS licensee has determined whether the proposed service is private or common carriage, either under the *NARUC I* standard or, for land mobile services, Section 331(c) of the Act, the licensee, in order to provide a common carrier service, must seek the appropriate authorization from the FCC.[38] The ITFS licensee will be in the same position, entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of common carrier services.[39]

129. ITFS licensees seeking to provide private carrier service on

[36] New Section 331(c)(1) of the Act provides, in pertinent part, that "private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly-authorized carrier."

[37] The Commission's interpretation of the test in the new legislation will be fully explored in our reconsideration of the *Second Report and Order*, Docket No. 20846, 89 F.C.C. 2d 741 (April 8, 1982), and our treatment of land mobile services herein is expressly subject to the outcome of that proceeding.

[38] These authorization and filing requirements are illustrated in greater detail in the FM-SCA *Report and Order* at paragraphs 25–27.

[39] In all cases, involving either private or common carrier services, the applicant will not be seeking approval for the technical facilities of the ITFS station. The Commission regards ITFS subcarrier and VBI use as a secondary privilege that runs with the primary ITFS station license. That right is conferred on the primary station licensee only. In this regard, it should be noted that an ITFS licensee that elects to use a subchannel for private or common carriage remains an ITFS licensee for all other purposes. Only the use of the subchannel for non-broadcast related purposes would be regulated in accordance with private radio or common carrier regulation.

an ITFS subchannel or VBI must notify the Licensing Division of the Private Radio Bureau at Gettysburg, Pennsylvania, 17325, by letter, prior to initiating service. In the letter, they must certify that their facilities will be used in this regard only for permissible purposes. *See* 47 C.F.R. Parts 90 and 94. When providing land mobile service, they must also certify that service will be offered only to users eligible under Part 90 of the Commission's Rules, and that any interconnection of the station with a telephone exchange or interexchange service or facility will be obtained in accordance with new Section 331 of the Communications Act, *supra*. Such notifications will not give rise to a comment period, and no separate authorization will be issued by the Commission. As in the case of common carrier services, the ITFS operator offering a private service will be in the same position, entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of such services.

E. *Selection Procedures*

130. Several of the commenters in this proceeding expressed the view that if the Commission decided to reallocate spectrum to the MDS, it should simultaneously act to ensure that the application processing procedure will not unduly delay the offering of multichannel MDS service to the public. The Ad Hoc Committee for Wireless Cable outlined the perceived problem as follows:

> Our primary concern in this regard is that the Commission might adopt a procedure involving comparative hearings for all of the allocated frequencies. It is inevitable that this will lead to interminable delays in conflict with the public interest. Recent Commission experience has established that a certain "gold-rush" mentality has accompanied reallocation of frequencies. The reallocation of frequencies to the Low Power Television Service spawned thousands of applicants and swamped the processing mechanism. Even the recently allocated spectrum for the Digital Electronic Message and Cellar Radio Service have been sought by more applicants than can be licensed.
>
> Moreover, many of the applications would probably not meet minimum qualifications necessary to operate a multi-channel MDS system. The development, construction, operation and maintenance of multi-channel MDS systems will require substantial and sophisticated experience in construction and operation of microwave facilities. The time and effort needed to evaluate the qualifications of potential applicants and then compare these applicants would delay the introduction of the service indefinitely, thereby eliminating the prompt introduction of new and innovative programming and the competition such an introduction would bring. Moreover, it would place substantial burdens on Commission resources and personnel.

Ad Hoc Committee Comments, *supra* at 5–6 (footnotes omitted). The National Association of MDS Service Companies (NAMSCO), the trade organization for users of licensed MDS facilities, expressed the view that "without a concurrently established procedure for processing new MDS applications, the benefits of the long awaited action in this proceeding will be rendered academic." Comments of the

National Association of MDS Service Companies, General Dockets 80–112 and 80–113, at 5 (July 2, 1982).

131. In its proposal Microband suggested that these problems could be avoided if the Commission were to "[expand] the capacity of existing MDS channel 1 and channel 2 in the top 50 markets by separate allocation." Microband Proposal, *supra*, at 87. In particular, what Microband proposed was that we reallocate three ITFS channel groups to the MDS and that we allow only existing MDS channel 1 licensees, permittees and applicants to apply for one of the reallocated groups for 1 year after the date of the order. A second reallocated channel group would be similarly reserved for channel 2 applicants, permittees and licensees. The third group would be available to any applicant that met the requirements of Section 21.900 of the Rules, 47 C.F.R. § 21.900. *Id.* Appendix F at 3. Thus, what Microband proposed is that two channel groups be made available for existing MDS licensees, permittees, and applicants and that another channel group be made available for all other applicants.

132. In support of its plan, Microband claimed "that the Commission has routinely established separate frequency allocations where the need for the new service was immediate." Comments of Microband Corporation of America, General Dockets 80–112 and 80–113, at 9 (July 2, 1982) (hereinafter cited as 2nd Microband Comments). In Cellular Communications Systems, the most recent Commission decision cited by Microband to support this proposition, we did state that "the Commission in the past has routinely established separate *wireline and non-wireline* frequency allocations" *Cellular Communications Systems, 86 FCC 2d 469, 492 (1981), on recon.*, 89 FCC 2d 58 (1982) (emphasis added) (hereinafter *Cellular Order* and *Cellular Order on Reconsideration*). In the Cellular Order, we reviewed the line of cases now relied upon by Microband and concluded that there is:

> [a] firm legal foundation for establishing a separate *wireline* allocation in a situation where, . . . (1) there is an immediate need for service to the public, (2) this need can be addressed quickly by a *wireline company's* expertise, (3) the separate allocation licensing scheme is a reasonable means of avoiding long delays in the availability of *any* cellular service attributable to comparative hearings, and (4) we have taken reasonable steps to guard against anticompetitive practices.

Cellular Order, *supra*, at 493 (emphasis added). Before applying these tests to the present situation, we first note that, in the past, we have only authorized separate allocations for wireline carriers in various mobile communications services. Wireline carriers and non-wireline carriers were two distinct classes of applicants for the services. There are not two distinct classes of MDS carriers. For this reason, we believe that Microband's reliance on our policy of making separate frequency allocations for wireline and non-wireline carriers providers of the same service to support its plan is misplaced.

133. Disregarding this fundamental distinction, we nevertheless apply the tests articulated in the *Cellular Order* to the Microband plan. First, is there an immediate need for service to the public? Microband and other MDS licensees and their customers have argued that there is an unmet public demand for a multichannel premium television service that multichannel MDS will satisfy. We do not believe that this demand is analogous to the verified congestion that existed on two-way mobile systems prompting our separate allocation decision for the Cellular Service. *Id.* at 489. Rather, we believe what really is at issue here is the timing of multichannel MDS entry into the pay television market relative to the growth curve of cable television and other competitive services. As Microband itself noted, "the primary market for multiple channel MDS will shrink at a rate of ten to fifteen percent per year of delay due to increased cable penetration alone." Second Microband Comments, *supra*, at 12. What Microband is telling us is that while there is now a need for multichannel MDS, the need may decrease with the passage of time. Thus, we believe it is reasonable to conclude that there is a demand for the delivery of multichannel premium programming that multichannel MDS would be well-suited to provide; however, the need for the service does not justify the separate allocation suggested.

134. Next, do existing licensees and permittees possess some special technical expertise in operating multichannel MDS systems? It is not clear that operating a single channel system gives a licensee multichannel expertise. Even assuming that Microband and other single channel licensees have some technical expertise in operating multiple channel systems as a result of their experience with single channel systems, we do not see how those entities that have only filed applications can be said to have any expertise at all. It could be argued that the only entities with any real experience in operating multiple channel video systems are cable television operators. Thus, we conclude that the Microband separate allocation proposal would not bring a significant special technical expertise to the multichannel MDS service. In reaching this conclusion, we are comparing the technical expertise of those that the Microband plan would favor with the expertise that wireline carriers had in cellular and related technology. The applicants that the Microband proposal would favor do not have equivalent expertise in multichannel MDS.

135. Third, would the separate allocation be a reasonable means to avoid long delays in making multichannel MDS available and, fourth, would it adequately guard against anti-competitive practices? We are considering these two criteria together because we believe that one of the fundamental elements of reasonableness is competitive effect. The Microband separate allocation scheme reasonably could be expected to result in the early availability of multichannel MDS service. The Microwave Communications Association, an

industry trade organization of MDS carriers, MDS users, equipment manufacturers and others, analyzed the results of the Microband plan as follows:

> Microband owns 26 Channel 1 MDS stations outright and partially owns an additional 9 Channel 1 MDS stations in which it has management responsibilities, or a total of 35 MDS stations - 70% of the top 50 markets. Further, Microband is a Channel 2 applicant in an additional 13 markets. Thus Microband potentially could have multiple channel ownership interests in 48 out of the top 50 markets. Even more significantly, since most of the Channel 2 markets are mutually exclusive with more than one applicant (there are only three Channel 2 licensees), Microband (or a Microband related company) would be the *sole* multichannel licensee in 64% of the top 50 markets until the mutually exclusive Channel 2 markets . . . were resolved.

Comments of the Microwave Communications Association, General Dockets 80–113, at 10 (July 2, 1982).

136. American Home Theatre, the MDS customer in Salt Lake City termed the Microband scheme "flagrantly anti-competitive" and concluded that what Microband was seeking was "a substantial 'leg-up' on the provision of multichannel MDS service while new entrants to the market place would still be tied up in litigation in comparative hearings before the Commission." Comments of American Home Theatre, Inc. With Respect to Proposal of Microband Corporation of America, General Docket 80–112 and 80–113, at 7 (June 2, 1982). On the other hand, Microband claims that if its plan were to be adopted, it would own only twenty-two percent of the 150 multichannel licenses and that this would result in a decrease in its percentage of ownership. Second Microband Comments, *supra*, at 8–9. Of course, because we are only authorizing two multichannel operations, rather than the three Microband proposed, Microband would have 33% of the licenses. We believe the quoted Microwave Communications Association analysis presents a more realistic view of the ownership statistics that would result if the Microband proposal were adopted. We have concluded that the adoption of the Microband separate allocation proposal would unnecessarily and unreasonably concentrate control of multiple channel MDS systems in a few entities including Microband, and that it would also give such entities a substantial head start in the provision of multichannel MDS service in most markets. Moreover, we believe that other means are available to make multichannel MDS available expeditiously, and we therefore conclude that the advantages of the Microband proposal are outweighed by its detriments.[40]

137. Having reached this conclusion, we must now decide whether to adopt any special procedure for dealing with the expected

[40] We recognize that our decision to authorize multichannel MDS could impact upon other services. However, there is no evidence in the record before us that would support protecting existing entities from competition and we expect the public overall to benefit from these authorizations.

large number of applications for the newly allocated channels. If we do nothing, the comparative hearing procedures of Part 21 of our rules will apply. As discussed above, many of those filing comments in this proceeding expressed the view that proceeding in this manner would embroil the applicants in lengthy comparative hearing procedures and thereby unnecessarily delay availability of the service to the public. Before discussing other procedures that could circumvent the problems caused by the comparative procedures, we feel that it is useful to consider Microband's view of the existing Part 21 procedures. In its proposal, Microband stated:

> This MX situation has been with the industry almost since its inception. Unlike some other segments of the communications industry, however, a solution to this problem has been found: merger of competing applications. In nine years, only four MX situations have actually been decided by resorting to comparative hearings. Microband believes that the joint venture solution, which has worked well to date, will continue to solve the MX problem with a minimum of expense to the applicants and to the Commission.

Microband proposal, *supra*, Appendix A, at 1, n. 1. Thus, Microband seems to contend that we should adopt a new procedure to avoid the problems of our comparative hearing procedures, and in the same proposal, tells us that our comparative procedures have worked rather well. This position is not necessarily inconsistent. The comparative hearing procedure can work well where there are only two or three entities applying for the same frequency. If there are 5, 10, or more mutually exclusive applicants for the same frequency, the comparative procedures work less well. In the first place, it is much less likely that 10 mutually exclusive applicants will reach an agreement to form a joint venture than if there are only two or three mutually exclusive applicants. Furthermore, in those situations in which it is necessary to hold a hearing among a large number of mutually exclusive applicants, it is likely that several of the applicants will be equally well qualified and thereby force us to make a choice on the basis of very minor differences in the applicants. For these reasons, we conclude that the comparative hearing procedure may not be the best method to resolve mutually exclusive multichannel MDS applications.

138. Some of those that predicted we would receive a large number of mutually exclusive applications if we authorized multichannel MDS suggested that we use a lottery procedure to grant multichannel MDS authorizations. For example, Contemporary Communications Corporation suggested that, "In the current procompetitive deregulatory environment, we believe the only fair method of selecting licensees is by lottery among applicants meeting threshold qualifications determined by the Commission." Additional Comments of CCC, *supra*, at 10.

139. Section 309(i) of the Communications Act authorizes us to grant licenses or permits "through the use of a system of random

selection". 47 U.S.C. § 309(i)(l). On March 31, 1983, we adopted the *Second Report and Order* in General Docket 81–768 in which we provided specific rules to implement a lottery scheme. In adopting the Order, we noted that Congress intended that we use a lottery where it would best serve the public interest and that we should consider the following factors in determining whether a lottery would be in the public interest: whether there are a large number of available licenses; whether there are a large number of mutually exclusive applications for each license, whether there is a significant backlog of applications, whether the lottery would significantly speed up the process of getting the service to the public; and whether diversity of information sources would be enhanced. Using these factors, we initially determined that 5 services are amenable to the use of random selection techniques. The services were low power television, private land mobile radio, private operational fixed microwave, aviation and marine services, and domestic public land mobile.

140. The new legislation also directs us to use notice and comment rulemaking procedures each time we intend to use a lottery in a specific service. 47 U.S.C. § 309(i)(4)(A). Many of the commenters in this proceeding predicted that we would receive a large number of applications if we made spectrum available for multichannel MDS. We agree that this is a likely result. We are therefore proposing to use a lottery to select all MDS permittees, both multichannel and single channel, in a separate Further Notice of Proposed Rulemaking in this Docket.

141. In regard to using random selection procedures for MDS, we note that we had previously proposed several alternative methods for selecting from among mutually exclusive MDS applicants.[41] One of the methods proposed was a lottery. The other two methods proposed were an auction and a paper hearing. The *Lottery Notice* was primarily concerned with the question of our legal authority to employ alternatives to comparative hearings to resolve mutually exclusive situations. Since the new legislation specifically authorizes us to use a random selection procedure and provides Congressional guidance on when the expedited procedure should be used, there is no reason to consider further the selection procedure proposals contained in the *Lottery Notice*.

142. The only other issue raised in that proceeding concerned trafficking rules. In the *Lottery Notice*, we suggested that, if we were to adopt a lottery procedure, it would also be appropriate to eliminate or modify the existing anti-trafficking rules now applica-

[41] In the Matter of Amendment of Part 21 of the Commission's Rules to Permit the Use of Alternative procedures in Choosing Applicants for Radio Authorizations in the Multipoint Distribution Service, *Notice of Inquiry and Proposed Rulemaking*, CC Docket No. 80–116, 45 Fed. Reg. 29,335 (May 2, 1980) (hereinafter *Lottery Notice*).

ble to MDS. *Lottery Notice, supra*, para. 74 and Appendix A. In Appendix A, we pointed out that the anti-trafficking provisions contained in Sections 21.27 and 21.39 of the Rules, 47 C.F.R. §§ 21.27, 21.39, are mandated by Section 310 of the Communications Act, 47 U.S.C. § 310. We further noted that Section 21.40 of the Rules, 47 C.F.R. § 21.40, was not required by the Act. This section gives us discretion to inquire whether a facility that has been operated less than 2 years by the proposed assignor or transferor had been acquired for the purpose of profitable sale rather than public service.

143. We recently considered the question of the continued usefulness of the anti-trafficking rules and policies with reference to broadcast licensees. *In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), Report and Order*, BC Docket No. 81–887, FCC 82–519, (released December 2, 1982) (hereinafter *Trafficking Order*). There we eliminated what was known as the "three year rule." That rule, which was similar to Section 21.40, required that we designate for hearing all applications for transfer or assignment of broadcast station licenses that had not been held for three years. *Id.* at para. 1. After reviewing the reasons for the rule and its effect during its 20 years of existence, we concluded that it was:

> appropriate to eliminate our . . . 'trafficking policy' and to limit Commission action in this area to enforcing the requirements of Sections 301 and 304 of the Communications Act. Such Commission inquiry will be restricted to whether any party has engaged in activity indicating action contrary to the statutory prohibition on license sales, such as attempting to profit on the transfer of a bare license. The Commission will continue to exercise its statutory authority under the Communications Act to determine that each transfer it approves is in the public interest.

Id; at para. 29. We also concluded that because Sections 301 and 304 state that radio station licenses do not convey a property interest, "profiting on the transfer of a construction permit is contrary to the letter and spirit [of these sections]." *Id.* at para. 32. Finally, we concluded that we should treat licensees that had obtained their license in a comparative hearing differently than other licensees. In particular, we held that a one year holding period after starting operation should be imposed on permits obtained through comparative hearings. *Id.* at para. 35.

144. Because the Part 21 common carrier trafficking rules stem from the broadcast policy, we have concluded there is no reason to continue to apply these rules to common carriers where we are no longer applying them to broadcast licensees. Therefore, for reasons analogous to those relied upon in the Trafficking Order, we have

decided to eliminate those portions of Section 21.40 that limit the free transferability of Part 21 licenses.[42] We shall retain those portions of Section 21.40 that limit the transferability of construction permits and we shall add new language to Section 21.40 to limit the transferability of station licenses that were obtained through comparative hearings. This action is independent of whether we ultimately decide to use a lottery for multichannel MDS. The new Section 21.40 is included in Appendix B.

145. Finally, we recognize that, although it is our belief that elimination of the trafficking rules will in general result in the more efficient use of the spectrum in that the ultimate licensee will be the entity that values it most highly, it is possible that situations could occur in which the licensee's best interest would be in not using the spectrum. For example, it is possible that a cable television company that had been awarded a cable franchise for a particular area but had not yet constructed its system would find it in its best interest to purchase the multichannel MDS license and not use the station, thereby preventing the establishment of MDS service in the area. This would preserve the largest possible customer base for the cable company. Because this is common carrier service, the licensee is required to render service on a reasonable basis in accordance with the obligations imposed by Title II of the Act. For this reason, we believe we have adequate regulatory tools to deal with this problem should it occur.

146. We have now resolved the only unresolved issue raised in the *Lottery Notice*. We are, therefore, terminating that proceeding. Comments relating to the use of a lottery in multichannel MDS should be filed in Docket 80–112.

F. *Application Procedures*

147. One of our primary concerns in making this reallocation is to ensure that no existing ITFS operation experiences unacceptable degradation in service as a result of the operation of a multichannel MDS station. For this reason, we are adding a new subsection to the rules requiring that multichannel MDS permittees demonstrate that they will not cause any harmful interference to any ITFS receiver site located within 50 miles of the proposed MDS transmitter location. 47 C.F.R. 21.902(d).

148. We have tried to anticipate other eventualities that could unduly delay the introduction of multichannel service to the public. One such eventuality, commonly referred to as "grid-lock", could be caused by the combination of a large number of applications and the operation of Section 21.31(c) of the rules, 47 C.F.R. § 21.31(c). Grid-

[42] Section 22.40 of the Rules is equivalent to Section 21.40. In common carrier Docket 80–57, we are considering the revision and updating of Part 22. We will consider equivalent changes to Section 22.40 in that proceeding.

lock refers to the situation in which applications proposing to serve widely separated geographical areas are mutually exclusive. For example, if two metropolitan areas, A and B, were separated by 75 miles and several applications were filed for each area, it is unlikely that any of the applications proposing to serve area A would be mutually exclusive with those proposing to serve area B. If, however, even one application was filed that proposed to serve the area located midway between area A and area B, it is likely that it would be mutually exclusive with all the applications proposing to serve area A *and* all the applicaitons proposing to serve B. This means that all of the applications proposing to serve area A would be in a sense mutually exclusive with those proposing to serve area B. If another area C were located 75 miles from either A or B, a similar set of circumstances could result in all the applications filed for area C being mutually exclusive with those filed for both area A and area B and the connecting areas. It is not difficult to envision a set of circumstances in which an application that proposed to serve a location in Maine would be mutually exclusive with an application proposing to serve a location in Florida.

149. We have considered several methods to avoid this result. One of these was to enforce rigorously Section 21.902(a) of the rules, 47 C.F.R. § 21.902(a), that requires all applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities. We do not believe that this rule alone is enough to avoid the problem. For this reason, we have decided to limit the applications that will be considered to be mutually exclusive for purposes of inclusion in either a comparative hearing or a lottery—if we should decide to use such a selection procedure in this service—to those applicants that propose to locate their transmitters within a given Standard Metropolitan Statistical Area (SMSA) or within 15 miles of the boundary of the SMSA (if the transmitter is not located in another SMSA) or that propose to serve the SMSA. In those situations where the SMSA to be served is a part of a Standard Consolidated Statistical Area (SCSA), it will be considered with all other applications proposing to serve the SCSA.[43] We are requiring applicants proposing to serve any portion of an SMSA to specify what SMSA it intends to serve. In those situations where SMSAs that are not part of SCSAs are either adjacent or so close that a single transmitter could produce a signal strong enough to cause harmful interference in both SMSAs, we require that each applicant not only specify which SMSA it intends to serve but also to detail what steps it will take to prevent blocking cochannel use in the adjacent SMSA. Issues of mutual exclusivity for applications not proposing to serve SMSAs

[43] We intend to use the list of SMSAs and SCSAs to be published by the Office on Management and Budget on June 30, 1983 as our source for SMSA definitions in this service.

will be resolved using only existing Part 21 Rules. However, we do require all such applicants to specify the name of the primary service area. Each applicant will only be allowed to file a single application for each service area.

150. We believe that by using techniques such as crosspolarization and frequency offsets that it will be possible to avoid cochannel interference in most situations. We stress again that we expect applicants to address this problem in their applications. *Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.*

151. We expect existing ITFS licensees to cooperate with would be MDS applicants to make channels available. We believe that cooperation between MDS providers and ITFS licensees could result in benefits to each. The ITFS licensees could benefit from the technical expertise of MDS operators and the MDS operators would benefit from access to the ITFS spectrum. Most importantly, the public will benefit from more intensive use of the spectrum.

152. All MDS applications must contain a statement that the applicant will comply with the following interference protection requirements:

1) With respect to the ITFS, the MDS operator must attempt to obtain the written consent of all licensees, permittees and applicants of cochannel and adjacent channel ITFS transmitters located within 50 miles of the MDS transmitter prior to commencing MDS construction facilities.

2) With respect to cochannel and adjacent channel MDS operations, the MDS applicant must provide the level of interference protection proposed in Docket 80–113 until a resolution of that proceeding has occured.

3) To assist us in enforcing Section 21.902(a) of our Rules, that requires applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities and adjacent channel use in the same city, the applicant must explain what efforts it has made to comply with this section.

Applicants will be granted construction permits conditioned on their submitting to the Commission, prior to commencing construction, a statement from all cochannel and adjacent channel ITFS licensees, permittees or applicants that have transmitter sites within 50 miles of the proposed MDS transmitter that the operation of the multichannel MDS facility will not cause harmful interference to their ITFS operations or if it does that the ITFS operator will accept such interference. If the applicant is not able, after making reasonable efforts, to obtain such a statement it may in the alternative submit evidence that the operation of the proposed MDS would not cause harmful interference to the existing ITFS operations.[44]

[44] In this regard it should be noted that lessees of the E or F group channels will not be protected from harmful interference caused by an MDS licensee operating on these channels.

153. Finally, as noted above, (*see* para. 88, *supra*) we do not believe it would be in the public interest to require the first group of applicants for the reallocated channels to submit the interference analysis required by Section 21.902(c)(1) of our Rules, 47 C.F.R. § 21.902(c)(1). For this reason, we are hereby waiving the requirement that the first group of applicants for the reallocated channels comply with Section 21.902(c)(1). If we subsequently decide to accept a second group of applications for these channels (*see* para. 154, *infra*) such applications must contain the interference analysis required by Section 21.902(c)(1).

154. Because it is possible that two new MDS construction permits will be granted simultaneously in some markets, and because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applicants to comply fully with Section 21.902(a). We will therefore allow MDS construction permit holders to apply for modifications to their facilities in order to minimize interference potential with other MDS and ITFS operations.

155. Section 21.43 our rules, 47 C.F.R. § 21.43, requires construction of an MDS facility within eight months of grant, although construction permit holders may request extensions. We believe that it is appropriate to grant extensions liberally to MDS construction permit holders in the E and F groups. The reason for this is that, particularly in major markets, many of the E and F channels will be occupied. In this case, the grant of an MDS construction permit is simply an authorization for the permittee to enter into negotiations with certain ITFS licensees. While the permittee may, subject to the interference protection requirements, commence operations on as few as one channel, the enterprise may not be viable unless a larger block is assembled. Hence, while we will look favorably on requests for time extensions of construction permits, such requests must include information on the permittee's efforts to assemble a viable block of channels and an estimate of the construction timetable.

156. In general, we will use existing Part 21 procedures to process multichannel MDS applications. However, we believe it is necessary to adopt procedures to deal with what we referred to in the *Cellular Reconsideration Order* as "one-upmanship". There we stated that:

> We want all participants to file applications which represent their best view of a service plan for the named SMSA. To do so, we do not find it necessary for participants to consult the plans of their potential competitors. Setting up a plan which would allow applicants to revise their filings after viewing the applications of others would encourage applicants to engage in "one-up-manship," which has harmful consequences. This would undermine our ability to compare proposals with some measure of confidence that the applicant had participated in its development. Plans based on another proposal would no longer represent the applicants' best idea of how to serve a given area but would, instead, represent applicants' use of the administrative process to obtain an advantage over competitors. Furthermore,

> allowing opportunity for one-up-manship would needlessly encumber an administrative process which we must streamline to its essentials if the American public is to receive cellular service without unnecessary delay.

Cellular Reconsideration Order, supra, at 89 (footnotes omitted). We recognize that there are significant differences between the technical planning required to operate a cellular communication system and that required to operate a multichannel MDS system. Our experience with both MDS and the more recently authorized Digital Electronic Message Service (DEMS) has taught us that some applicants merely copy applications that have previously been filed and resubmit them with the names changed. We believe that this kind of activity does smack of the "land rush" or "gold rush" mentality that concerned many of the commenters in this proceeding. Our experience with single channel MDS applications is that in many instances a local entity will perceive the need for service in its community and file the appropriate application only to have another entity file a competing application on the final day allowed by our Rules thereby delaying the introduction of service to the public. We do not believe that such activity is in the public interest. We will, therefore, initially only accept multichannel MDS applications on the 45th day after publication of this Order in the Federal Register.[45] We cited the well-established legal precedent for proceeding in this manner in the *Cellular Reconsideration Order* and noted that this procedure "treats all prospective applicants equally and fairly by giving them substantial advance notice of due dates for their applications." *Id.* at 90. After processing the first set of applications, we will determine whether to proceed to accept further applications in this manner or to allow applicants to file using the existing Part 21 cut-off procedures.

G. *Other Matters*

157. Several of the commenters in this proceeding questioned the need and wisdom of continuing to regulate MDS as a common carrier service. Michael Benages claimed that:

> The Commission's rules impose on the MDS licensee its status as a common carrier, but they do not alter the fact that in operation the licensee is functionally equivalent to [a] broadcast licensee, and most specifically, the licensee of a subscription television facility.

Comments on Proposal of Microband Corporation of America, by Michael Benages, General Dockets 80–112 and 80–113, at 7–8 (July 2, 1982). In the same vein Tekkom commented that:

> Common sense would dictate a current regulatory approach to MDS similar to that adopted for STV. STV is, as a practical matter, little different from MDS. In STV, the licensee can either operate the subscription television service or sell the

[45] If the 45th day after release of this Order falls on a holiday, applications should be filed on the next business day. 47 C.F.R. §§ 1.4(i), (d).

> airtime to another under terms of a contract negotiated to meet the marketplace realities. The staff's adherence to a strict interpretation of tariff rules prevents MDS from being allowed to act on a cost efficient basis and, instead, imposes a regulator's view as to what is "*possible, practical and desirable.*"

Comment of Tekkom, Inc., *supra*, at 4–5. Contrasted to these views is the view expressed by the Ad Hoc Committee for Wireless Cable.

> [T]he Commission wisely chose to establish MDS as a common carrier service. By separating the ownership of facilities from decisions over programming, the Commission permitted the risks of this new venture to be spread among different entrepreneurs with differing focuses, interests and abilities. Whereas Carriers gained expertise in system construction and operation, Operators moved into each community and provided the service which they believed was most demanded in that community. The latter invested their resources in trucks, technicians, reception equipment, programming and advertising. They were also unencumbered by the costs of regulatory compliance. This separation of investment risks has maximized the speed with which MDS has grown.
>
> The existing MDS structure has worked well and has been to the benefit of the public: It should not be changed for the sake of change . . ..

Comments of the Ad Hoc Committee, *supra* at 11–12. Because we did not propose to change the regulatory status of MDS in this proceeding, we believe it would be inappropriate for us to act on this issue in this proceeding. Those who believe that this issue should be addressed further are invited to submit a Petition for Rulemaking.

158. The National Cable Television Association (NCTA) and Warner Amex Cable Communications, Inc. (Warner Amex) filed comments concerning another issue not raised in the *Notice*. Warner Amex and NCTA point to heavier regulatory burdens faced by cable television systems as compared to those faced by other providers of video services including MDS and conclude that the Commission should act to eliminate these disparities. The NCTA position is that:

> [I]t is crucially important that the Commission recognize that the new service that Microband proposes would enjoy significant regulatory advantages over cable that would distort competition between the two services. To promote its own objectives of fostering true competition and diversity, the Commission should accompany any authorization of Microband's proposed service with a comprehensive proceeding fashioned to level the playing field on which MDS, cable and the other old and new video services will compete.

Comments of the National Cable Television Association, Inc., General Docket 80–112 and 80–113, at 12 (July 2, 1982). Warner Amex concludes that:

> Before considering Microband's proposal and the issues in the above-captioned rulemaking proceedings, the Commission must first address the issue of regulatory parity among competing technologies. To ignore this issue any longer, while at the same time creating additional economic advantages for cable's competitors (via preemption), is unfair to the cable industry, its subscribers and the public interest generally.

Comments, Warner Amex Cable Communications, Inc., General Dockets 80–112 and 80–113, at 6 (July 2, 1982). It may not be possible

(assuming it were desirable) to "level the playing field" on which multichannel MDS and cable "play." There are vast technological differences between multichannel MDS and cable that strongly favor cable. Cable systems have the capability of providing more than one hundred channels of television service. The multichannel MDS systems we are authorizing today are limited to four channels. Cable systems have the capability to serve all locations within a service area. Our experience with single channel MDS is that most operators, because of various propagation factors, have difficulty serving more than 50% of the locations within their service areas. Furthermore, the service areas of MDS operators are frequently much smaller than the service areas of cable companies. As far as regulatory burdens are concerned, MDS licensees are subject to the full panoply of Title II common carrier regulation. Cable has never been subject to these obligations. For these reasons, we find little merit to arguments raised by NCTA and Warner Amex as presented. Petitioners may wish to submit a petition for rulemaking addressing these issues in a substantiated, focused manner.

159. Turner Broadcasting Systems (TBS) urged that we act on its *Petition for Rulemaking* requesting the deletion of the cable television "must-carry" rules. TBS notes that Microband in its proposal claims that multichannel MDS operators will provide the "right mix" of channels on their systems to maximize subscribers and concludes that cable television systems, especially 12 channel systems, are not free to similarly provide the "right mix" of programming to their customers because of the must-carry rules. TBS's petition is now being studied by the Commission staff. However, we do not believe it would be in the public interest to delay this proceeding pending action on the TBS petition.

160. Finally, on December 21, 1979, Microband filed a *Petition for Rulemaking*, RM-3540, in which it requested that we investigate the feasibility of exchanging the existing MDS channel 2 allocation (2156–2162 MHz) with a 6 MHz band allocated to some other service. Microband suggested that we consider common carrier frequencies in the 2110–2130 MHz and 2162–2180 MHz bands or operational fixed frequencies in the 2130–2150 MHz, 2180–2200 MHz and 1850–1990 MHz bands. Microband's reason for submitting this petition was its concern that channel 2 operation would cause unacceptable adjacent channel interference with existing channel 1 operations. As discussed above, channel 1 and channel 2 are now being operated in Phoenix, Arizona and none of the interference problems suggested by Microband have materialized. Furthermore, since we are by this order removing the restriction limiting MDS operators to single channel per service area, we believe that many channel 2 operators can enter into joint ventures with existing channel 1 operators and thereby make two channel service available. For these reasons, we have concluded that there is no need to proceed with the rulemaking

suggested by Microband and we will by this Order dismiss its petition.

IV. *Regulatory Flexibility Act*

161. The Regulatory Flexibility Act of 1980 does not apply to rules adopted after January 1, 1981 when the underlying notice of proposed rulemaking was adopted before that date. The underlying *Notice of Proposed Rulemaking* for this proceeding was adopted March 19, 1980. Accordingly, there is no need for certification under the Regulatory Flexibility Act. See 5 U.S.C. § 601.

V. *Conclusion*

162. We believe that we have in this *Report and Order* arrived at equitable treatment of all concerned parties and at the same time have adopted policies that best serve the public interest. In particular, we believe that the policies and rules set out herein recognize and provide for the unique needs of the existing and potential users of the ITFS channels and also provide would-be providers of multichannel MDS service spectrum to meet anticipated public demand. This proceeding has required that we balance difficult competing interests in reaching a decision which should result in more intensive use of the spectrum while preserving legitimate needs of existing users.

163. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r), that Title 47 of the Code of Federal Regulations IS AMENDED as described in Appendix B. These amendments shall become effective thirty days after publication of this Order in the Federal Register and we will accept mutichannel MDS applications *only* on the forty-fifth day after publication of this Order in the Federal Register.

164. IT IS FURTHER ORDERED that the Microband Petition for Rulemaking RM-3540 IS DISMISSED and that proceeding IS TERMINATED.

165. IT IS FURTHER ORDERED that the proceeding in Common Carrier Docket 80–116 IS TERMINATED.

166. IT IS FURTHER ORDERED, that the portion of the application of Channel View, Inc. requesting authority to conduct a market experiment, File No. 8938-ED-MR-82, IS DENIED.

167. IT IS FURTHER ORDERED that the developmental applications of Contemporary Communications Corporation to construct and operate multichannel over-the-air pay video service facilities in New York, Chicago, Los Angeles, St. Louis, and Philadelphia, File No. BPEX-820802KH, ARE DENIED.

168. IT IS FURTHER ORDERED that Form 330P IS AMENDED as set forth in Appendix C effective upon obtaining approval of the Office of Management and Budget as required by the Paperwork Reduction Act. 44 U.S.C. § 3502(4).

169. IT IS FURTHER ORDERED that applications for Channel Groups E and F filed after 12:00 PM, May 26, 1983, must be consistent with the provisions herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Comments for General Docket 80–112

Illinois Institute of Technology
Memorial Hospital Medical Center of Long Beach, CA
Interact: Interactive Television Network, Hanover, NH
The American College of Physicians
Spring Branch Independent School District, Houston, TX
Joint Council on Educational Telecommunications
Indiana Higher Education Telecommunications System
San Diego City Fire Department
Association of Hospital Television Networks
Georgia Institute of Technology
Harris Corporation
Farinon Electric Operations
Purdue University
Oklahoma State Regents for Higher Education
Association of American Railroads
Communications Satellite Corporation
KLVX Channel 10, Las Vegas, NV
Connecticut Board of Education
State of MO, Dept. of Elementary and Secondary Education
Office of the Los Angeles County Superintendent of Schools
Northeastern University
Anaheim City School District
Superintendent of Public Instruction State of North Carolina
Board of Education, Chicago, IL
Bert Edwards
Ninth District PTA (California)
University of California, Santa Barbara
Instructional Television Center, Dallas Co. Community College
American Association for Community Junior Colleges' Task Force on the Uses of Mass Media Learning
Advanced Micro Devices Inc.
Colorado State University
Lawrence Livermore Laboratory
Daytona Beach Community College
Watkins-Johnson Company
The University of Alabama in Birmingham
Vista Unified School District, Vista, CA
Hillsborough County Public Schools
Sperry Univac Computer Systems
The Hospital Council of Western Pennsylvania
University of Colorado
Miami-Dade Community College
Hewlett-Packard Company
El Centro College, Dallas, TX
South Bay Union School District
Systems Control, Inc.

Bakersfield City School District
Satellite Business Systems
National Aeronautics & Space Administration
Intel Corporation
School Board of Pinellas County, FL
American College of Radiology, Chicago, IL
Eastfield College
Richland College
Long Beach Unified School District
San Dieguito Union High School District
Honorable, Senator Harrison Schmitt (NM)
Southern Pacific Communications Company
Ford Aerospace & Communications Corporation
Cherry Electrical Products Corporation
Lakeside Union School District
Indiana Higher Education Telecommunication System
California Media & Library Educators Association
TV College Consortium San Diego & Imperial Counties Community College Association
The School Board of Broward County, FL.
Argonne National Laboratory
The California State University & Colleges
Mark Controls Corporation
San Diego Regional Instructional Television Fixed Service System
San Diego County Superintendent of Schools
Florida Department of Education
Fresno County Department of Education
San Diego Unified School District
Rev. John Geaney, C.S.P. Unda - USA
San Diego Miramar College
South Carolina Educational Television Commission
National Educational Association
Southwestern College
Arizona State University
San Diego & Imperial Counties Community College Association
MiraCosta College
Teleprompter Corporation
National Association of Educational Broadcasters
National Public Radio
Satellite Syndicated Systems, Inc.
Public Service Satellite Consortium
University of South Florida
California Public Broadcasting Commission
Northstar Communications
Elburn MDS Co.
San Bernardino MDS Co.
Angeles MDS Co.
Microwave Communications Systems, Inc.
The National Association of Public Television Stations
Sylvania Systems Group
Oceanside Unified School District, CA
Board of Regents, The University of Wisconsin System
Dade County Public Schools
Illinois Institute of Technology
Kirkwood Community College
Central Committee on Telecommunications of the American Petroleum Institute
American Library Association
Superintendent of Public Instruction, State of California

A. Ruth Badgett
Homer H. Badgett
Nantucket MDS
Marion County Schools, Ocala, FL
Commonwealth Edison, Trustee of the Illinois Institute of Technology
Massachusetts Department of Education
California Department of Education
School Board of Palm Beach County, FL
Chula Vista City School District, CA
Caterpillar Tractor Co.
Association for Educational Communications & Technology
New Trier Township Television/Film Cooperative
Coronado Unified School District, CA
Cable Television Review Commission County of San Diego, CA
Pasadena Unified School District, CA
Southern California ITFS Advisory Committee
Jules Cohen & Associate
International Harvester
Illinois Institute of Technology
American Association of School Administrators
Ohio Educational Broadcasting Network Commission
Georgia State Board of Education
Schwartz, Woods & Miller
CBS, Inc.
Archdiocese of San Francisco
University of Maryland
National Telecommunications & Information Administration
Joint Council on Educational Telecommunications
National Association of MDS Service Companies, Inc.
Public Interest Satellite Association
Archdiocese of Los Angeles
National Instructional Telecommunications Council, Inc. and Catholic Television Network
U.S. Catholic Conference
The Leland Stanford Junior University
The Volusia County School Board
Motorola, Inc.
Corporation for Public Broadcasting
Center for Excellence, Inc.
Archdiocese of New York
University of California
Grossmont Community College District
University of Minnesota
Aiken Cablevision, Inc.
Colony Communications Corporation
Comcast Corporation
Cox Cable Communications, Inc.
Palmer Communications, Inc.
U.S. Department of Education
The Prism Company
Palomar College
St. Petersburg Junior College
David A. Fountain
University of California, San Francisco
University of Southern California
Illinois Institute of Technology
Jet Propulsion Laboratory
Richardson Independent School District

Huntsville City Schools
National Catholic Educational Association
The Association for Higher Education of North Texas
Office of the Governor of Georgia
Rocky Mountain Corporation for Public Broadcasting
School Board of Dade County, FL
Standard Oil Company of California
Norman M. Jackson
Microband Corporation of America
Centerstage
Humbert Cardinal Medirros, Archbishop of Boston
The Los Angeles Radiological Society
General Dynamics
Glendale District, Los Angeles County Medical Association
KHS78 Instructional TV, Mesquite, TX
(TAGER) The Association for Graduate Education & Research
Concordia College
Texas Wesleyan College
U.S. Catholic Conference
F. Raymond Zintz
Boston Catholic Television Center
Electronics, Missiles and Communications, Inc.
The Association for Higher Education of North Texas
University of Maryland
Catholic Television Network San Francisco
Richardson Instructional Television Center
Instructional Television of the Archdiocese of N.Y.
Corporation for Public Broadcasting
CBS, Inc.
Microband Corporation of America, "Urbanet" Proposal

Responses to Microband's "Urbanet" Proposal

Reverend Jesse L. Jackson, Operation Push, Inc.
The Archdiocese of Los Angeles
Ad Hoc Committee for Wireless Cable
American Home Theater, Inc.
Bogner Broadcast Equipment Corporation
Omega Communications, Inc.
Test, Inc.
Vista Unified School District
National School District, National City, CA
San Diequito Union School District, CA
Chula Vista City School District, CA
Cajon Valley Union School District, CA
San Diego Unified School District
Palomar College
California Media and Library Educators Association
National Cable Television Association, Inc.
Microband Corporation of America
Pay Television of Greater New York, Inc.
American Cable
Showbiz
Santa Ana Unified School District
Alfred E. Anscombe
Regional Educational Television Advisory Council of Los Angeles County
Telicare, Diocese of Rockville Centre
Ultravision Communications

State of Connecticut, Board of Education
California State University, Sacramento
The California State University System
University of Maryland - College of Engineering
Public Broadcasting Service
Turner Broadcasting System
Indiana Higher Education Telecommunication System
Mary Sue Manley
TRI-State Regional Planning Commission
Northeastern University
Multipoint Distribution Systems
Superintendent Fresno County Schools
California State College, Stanislaus
Legislative Commission on Science and Technology, State of N.Y.
CBS, Inc.
The Association of Hospital Television Networks
Microband Corporation of America
Long Beach Unified School District
Metropolitan Education and Cultural Communications Association
Northeastern University
Simmons College
Suffolk University
WGBH Educational Foundation
University of Massachusetts
Boston Catholic Television Center
Harris Corporation-Farinon Electric Operations
Aiken Cablevision, Inc.
Colony Communications Corporation
Comcast Corporation
Connersville Cable TV, Inc.
Cox Cable Communications, Inc.
Multimedia Cablevision, Inc.
Palmer Communications Incorporated
Televents, Inc.
U.S. Cable Corporation
The Association for Higher Education of North Texas
Catholic Television Network
Center for Excellence, Inc.
Illinois Institute of Technology
National Instructional Telecommunications Council, Inc.
The Leland Stanford Junior University
San Francisco Archdiocese
Movie Systems, Inc.
Walter B. Hewlett and Michel Guite
Robert A. Bednarek
The Corporation for Public Broadcasting
Department of Education, San Diego County
Richard L. Vega & Associates
First National Home Theaters, Inc.
Microwave Communications Associations Inc.
South Carolina Educational Television Commission
Michael Benages
Sunday School Board of the Southern Baptist Convention
Rev. George Byrne Diocese of San Diego
University of California, Berkely
Contemporary Communications Corporation
Indiana University
National Black Media Coalition

Sterling Recreation Association
National Association of MDS Service Companies
Oklahoma State Regents for Higher Education
Department of Communications, United States Catholic Conference
Sterling Recreation Organization Company
State of New York, Legislative Commission on Science & Technology
David S. Saxon, President University of California
University of California, Systemwide Administration
California Community Colleges ITFS Advisory Committee
Superintendent of Public Instruction, State of California
University of California, San Francisco
San Diego and Imperial Counties, Community Colleges Association
Tekkom, Inc.
KLVX Channel 10, Las Vegas, Nevada
Standard Communication
Gordon & Healy
Warner Amex Cable Communications, Inc.
Emerson College
National Association of Public Television Stations
Central Committee on Telecommunications of the American Petroleum Institute
Department of Education, State of Florida
Los Rios Community College District
TV 5 The Movie Channel
Grambling State University
Georgia Institute of Technology
Bay Area Community College Television Consortium
University of South Carolina
Telecommunications Systems, Inc.
Viking Communications
Lance Industries
Grossmont Community College District
Imperial Valley College
University of South Carolina
Marshall University
San Diego State University
Ninth District PTA (CA)
Mendocino County Superintendent of Schools
University of California, San Diego
Muzak Dynamic Sound
TDS Engineering Co.
Conifer Corporation
Lipper-LaRue
Twin Cities Public Television Inc.
Troy State University
Miami-Dade Community College
Townsend Associates
Southwestern College
Electronics, Missiles & Communications, Inc.
Archdiocese of New York
The School Board of Broward County, Florida
Channel Master
Coronado Unified School District
University of California, Davis
University of California, Irvine
University of California, Riverside
University of California, San Diego
San Diego Miramar College
John W. Hunt

California State Steering Committee for Curriculum Development & Publications
Woodrow Wilson Junior High School, CA
Lawrence Livermore National Laboratory
The School Board of Marion County, FL.
Taft Broadcasting Corporation
Southern California Instructional TV Fixed Service Advisory Committee
Superintendent of Public Instruction, State of California
Ms. Anne G. Wall
Don Ferkovich
David D. Pascoe
W. D. Stainback
Ms. Helen L. Patterson
Rosemarie Nelson
Temple University
Grossmount Union High School, CA
Catholic Television Network of Chicago
Ms. Mary M. Long, Meridian School
Ms. Linda A. Brown
Ms. Carol R. Esmay
Mr. Peter J. Saccone
Bernadine Hollers
Ms. Sabina R. Meyers
School Board of Palm Beach County, FL
Ms. Janice E. Peters
Miramar Ranch School
Lakeside Union School District
Ms. Deanna Oakes
Ballantyne Elementary School
Mr. Paul Dekock
Diocese of San Diego
Santee School District
Marquee Television Network, Inc.
Nevada Pay Television, Inc.
Educational TV Association of Metropolitan, Cleveland
American Association of State Colleges & Universities
Sandia National Laboratories at Livermore, CA
NASA
Edmund G. Brown, Jr.
California Postsecondary Education Commission
American Council on Education
American Association of Community and Junior Colleges
National Association of State Universities and Land-Grant Colleges
National University Continuing Education Association
Fresno County Department of Education
California Community Colleges
Assemblyman, Denes J. Butler, New York State
CBS, Inc.
Eastfield College

List of Reply Comments

American Broadcasting Companies, Inc.
Microband Corporation of America
Citizens Communications Center
U.S. Department of Education
National Association of Educational Broadcasters
The Corporation for Public Broadcasting
National Instructional Telecommunications Council, Inc.

National Association of Public Television Stations
Catholic Television Network
The Leland Stanford Junior University
Illinois Institute of Technology
Center for Excellence, Inc.
San Francisco Archdiocese
The Association for Higher Education of North Texas
Utilities Telecommunications Council
Central Committee on Telecommunications of the American Petroleum Institute
Teleprompter Corporation
Public Interest Satellite Association
Joint Council on Educational Telecommunications

APPENDIX B

Parts 2, 21, 74 and 94 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. In Section 2.106, for band designated in column 5 as 2535–2655 MHz, add "Multipoint distribution" to corresponding list in column 9 designated as Class of Station in existing Table of Frequency Allocation as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

Band (MHz) 5	*Class of Station* 9
2535–2655	Instructional television fixed. Operational fixed. Space. Multipoint distribution.

* * * * *

NG 47

In the band 2500–2690 MHz, channels in 2500–2686 MHz and the corresponding response frequencies 2686.0625–2689.8125 MHz may be assigned to stations in the Instructional Television Fixed Service (Part 74 of this Chapter); channels in 2596–2644 MHz and response frequencies 2686.5625–2689.6875 MHz may be assigned to Multipoint Distribution Service stations (Part 21 of this Chapter); and channels 2650–2656 MHz, 2662–2668 MHz and 2674–2680 MHz and response frequencies 2686.9375 MHz, 2687.9375 MHz and 2688.9375 MHz may be assigned to stations in the Operational Fixed Service (Part 94 of this Chapter). In Alaska, however, frequencies within the band 2655–2690 MHz are not available for assignment to terrestrial stations.

* * * * *

2. In Section 21.2, a definition for Multipoint Distribution Service response stations is added in appropriate alphabetical sequence to read as follows:

§ 21.2 Definitions.

* * * * *

Multipoint Distribution Service response station. A fixed station operated at an MDS receive location to provide communications with the associated station in the Multipoint Distribution Service.

3. Section 21.40 is amended by revising paragraph 21.40(a) and the introduction to paragraph 21.40(c) as follows:

§ 21.40 Considerations involving transfer or assignment applications.

(a) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses or construction permits whenever applications (except those involving a *pro forma* assignment or transfer of control) for consent to assignment of a common carrier construction permit or license, or for transfer of control of a permittee or licensee, involve facilities which have been operated for less than one year by the proposed assignor or transferor. Only licenses that were obtained following a comparative hearing are subject to this section. At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that the proposed assignor or transferor has not acquired an authorization or operated a station for the principal purpose of profitable sale rather than public service. This showing may include, for example, a demonstration that the proposed assignment or transfer is due to changed circumstances (described in detail) affecting the licensee or permittee subsequent to the acquisition of the permit or license, or that the proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests.

* * * * *

(c) For the purposes of this section, the one year period is calculated using the following dates (as appropriate):

* * * * *

4. Section 21.901 is amended by revising paragraphs 21.901(a), 21.901(b) and 21.901(d) as follows:

§ 21.901 Frequencies.

(a) Frequencies in the bands 2150–2162 MHz and 2596–2644 MHz are available for assignment to fixed stations in this service. Frequencies in the band 2150–2160 MHz are shared with nonbroadcast omnidirectional radio systems licensed under other parts of the Commission's Rules, and frequencies in the band 2160–2162 MHz are shared with directional radio systems authorized in other common carrier services. Frequencies in the 2596–2644 MHz band are shared with Instructional Television Fixed Service Stations licensed under Part 74 of the Commission's Rules. The response channels E1, E2, E3, E4, F1, F2, F3, and F4 listed in § 74.939(d) are also available for assignment to fixed stations in this band and are shared with Instructional Television Fixed Service stations licensed under Part 74 of the Commission's Rules.

(b) Applicants may be assigned a channel(s) according to one of the following frequency plans:

(1) At 2150–2156 MHz (designated as channel 1),

(2) At 2156–2162 MHz (designated as channel 2), or

(3) At 2156–2160 MHz (designated as channel 2A), or

(4) At 2596–2602 MHz, 2608–2614 MHz, 2620–2626 MHz and 2632–2638 MHz (designated as channels E1, E2, E3 and E4 respectively with the four channels to be designated the E-group channels) and the associated response channels E1, E2, E3 and E4 listed in § 74.939(d), or

(5) At 2602–2608 MHz, 2614–2620 MHz, 2626–2632 MHz, and 2638–2644 MHz (designated as channel F1, F2, F3 and F4 respectively with the four channels to be designated the F-group channels and the response channels F1, F2, F3, and F4 listed in § 74.939(d).

* * * * *

(d) Frequencies in the band 2596–2644 MHz and associated response channels will be assigned only in accordance with the following conditions:

(1) Prior to commencing construction of any facilities to use frequencies in this band permittees must submit to the Commission a written statement from all cochannel and adjacent channel Instructional Television Fixed Service Licensees, Permittees or Applicants with transmitters located within 50 miles of the permittee's transmitters that operation of the permittee's transmitter will not cause harmful interference to Instructional Television Fixed Service Operation or that the Instructional Television Fixed Service Licensee, Permittee, or Applicant will accept whatever interference occurs. If the permittee is unable to obtain such a statement from the ITFS Licensee, Permittee, or Applicant it may submit a Petition for Declaratory Ruling pursuant to Section 1.2 of this Chapter on the issue of whether harmful interference will occur. The Petition must be simultaneously served on the affected ITFS entity. In such cases, the Commission will determine if harmful interference will occur using accepted engineering standards. The MDS permittee must also detail what efforts it made to obtain the desired statement from the ITFS operator.

(2) The E-group channels will be assigned to a single applicant in each area and the F-group channel will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

(3) All applicants for frequencies in this band must specify the channels being applied for; however, the Commission may on its own initiative assign different channels in the band if it is determined that such action would serve the public interest.

(4) Notwithstanding the provisions of Section 21.31 of this part, applications for frequencies in this band will be accepted only on the date(s) specified by the Commission.

(5) Notwithstanding the provisions of Section 21.31(a) all applications that propose to locate transmission facilities within or within 15 miles of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. In the case of a Standard Consolidated Statistical Area (SCSA) all applications that propose to locate facilities within or within 15 miles of the boundary of any SMSA contained in the SCSA will be considered together. In those cases in which an applicant proposes to locate its transmission facilities so that it will be located in, or within 15 miles of, more than one SMSA, the applicant must specify which SMSA it intends to be its primary service area. Each application will be entitled to comparative consideration or to be included in a lottery in only one such service area.

(6) Licensees or permittees of the frequencies in this band may petition the Commission to authorize exchange of assigned channels to allow adjacent channel operation. For example, one licensee may be assigned channels E1, F1, E2, and F2 and the other licensee could be assigned channels E3, F3, E4, and F4. Such a petition will be granted if the petitioners show that the exchange will result in better service to the public.

(7) All applications for frequencies in this band must contain a showing of how interference with the operation of adjacent channels will be avoided and what steps the applicant has taken to comply with subsection 21.902(a) of this section.

5. A new paragraph (d) is added to existing Section 21.902 as follows:

§ 21.902 Frequency interference.

* * * * *

(d) All permittees of frequencies in 2596–2644 MHz band must, prior to commencing construction of any transmission facility, file with the Commission an analysis demonstrating that the facility to be constructed will not cause any harmful interference to existing cochannel or adjacent channel Instructional Television Fixed Service receiver locations within 50 miles of the transmitter, or, in the alternative, submit a statement from the ITFS licensee that the interference is acceptable.

6. A new Section 21.909 is added to read as follows:

§ 21.909 MDS response stations.

(a) An MDS response station is authorized to provide communication by voice and/or data signals with its associated MDS station. An MDS response station may be operated only by the licensee of the MDS station or its subscriber and only at a receiving location of the MDS station with which it is communicating. More than one response station may be operated at the same or different receiving locations. All MDS response stations communicating with a single MDS station shall operate within the same frequency channel. The specified frequency channel which may be used by the response station is determined by the channel assigned to the MDS station with which it communicates. The specified frequency channel may be subdivided to provide a distinct operating frequency for each of more than one response station.

(b) Authorization of an MDS response station is subject to the following terms and conditions:

(1) The response station shall not cause interference to any station operating beyond the service area of the MDS station with which it communicates.

(2) The Commission's Engineer-In-Charge of the radio district in which intended operation is located shall be notified prior to the commencement of the operation of each response station. Such notice shall include:

(i) The authorized call sign of the MDS station, the transmitter location number (assigned by the carrier in sequence of use beginning with number one) and the response station location coordinates.

(ii) The exact frequency or frequencies to be used.

(iii) Anticipated date of commencement of operation.

(3) The Engineer-In-Charge shall be notified within 10 days after termination of any operation. The notice shall contain similar information to that contained in the notice of commencement of operation.

(4) Each station shall have posted a copy of the notification provided to the Engineer-In-Charge.

(5) The antenna structure height employed at any location shall not exceed the criteria set forth in Section 17.7 of this chapter.

7. The following definitions will be added at the end of the list of definitions in Section 74.901:

§ 74.901 Definitions.

* * * * *

Main channel: The main channel is that portion of each authorized channel used for the transmission of visual and aural information as set forth in Section 73.682 of this Chapter and Section 74.938 of this Subpart.

Subsidiary channel: A subsidiary channel is any portion of an authorized channel not used for main channel transmissions.

8. Section 74.902 is amended by adding a new paragraph (c) as follows and by redesignating existing paragraphs 74.902(c) and 74.902(d) as paragraphs 74.902(d) and 74.902(e) respectively.

§ 74.902 Frequency assignments.

* * * * *

(c) Channels 2596–2602, 2602–2608, 2608–2614, 2614–2620, 2620–2626, 2626–2632, 2632–2638, and 2638–2644 MHz and the corresponding response channels listed in Section 74.939(d) are shared with the Multipoint Distribution Service. No new Instructional Television Fixed Service applications for these channels filed after May 25, 1983 will be accepted. In those areas where Multipoint Distribution Service use of these channels is allowed pursuant to § 21.902, Instructional Television Fixed Service users of these channels will continue to be afforded protection from harmful cochannel and adjacent channel interference from Multipoint Distribution Service stations.

* * * * *

9. Section 74.931 is amended by revising paragraph (e) and by adding a new paragraph (f) to read as follows:

§ 74.931 Purpose and permissible service.

* * * * *

(e) The excess capacity of each channel licensed in this service may be used for the transmission of material to be used by others in addition to material specified in (a), (b), (c) and (d) of this section. Each station licensed in this service must use a significant portion of the main channel capacity of each authorized channel for the transmission of material specified in subsections (a), (b) and (d) of this section. All of the capacity available on any subsidiary channel of any authorized channel may be used for the transmission of material to be used by others. When an ITFS licensee makes excess capacity available on a common carrier basis, it will be subject to common carrier regulation. Licenses operating as a common carrier are required to apply for the appropriate authorization and to comply with all policies and rules applicable to the service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the ITFS licensee. Initial determinations by licensees are subject to Commission examination and may be reviewed at the Commission's discretion. Leasing activity may not cause unacceptable interference to cochannel and adjacent channel operations.

(f) Material transmitted by these stations may be intended for simultaneous reception and display or may be recorded by authorized users for use at another time.

APPENDIX C

1. Form 330P, Application for Authority to Construct or Make Changes in an Instructional TV Fixed Station and For Response Station(s) and Low Power Relay Station(s) is amended by adding the following:

* * * * *

Describe briefly the primary purpose of the requested authorization.

State the anticipated percentage of time for which the channel will be used by entities other than the licensee.

List the total number of existing authorizations and state the combined percentage of time for which these channels are presently used for transmissions of material for others.

May 26, 1983

Concurring Statement of
FCC Commissioner James H. Quello

In re: Frequency Reallocation to the Multipoint Distribution Service (MDS), General Docket 80–112 & CC Docket 80–116

As you know, my consistent position on this issue has been that there is a heavy burden of proof on those who seek to take away frequencies reserved for educational purposes. I am concerned that the Commission is not adequately taking into consideration the educational community's future needs for this spectrum as this nation moves into the information age. Nevertheless, the staff and some of my colleagues do want to make additional channels available for commercial video services. Given that this is inevitable, I believe that this document represents an exceptional balancing of competing interests in a very difficult area. I believe that if reallocation must result, this document appears to be a reasonable approach which maintains priority where it belongs—with educational entities.

I have been reluctantly persuaded to concur in this document because of the following provisions and assurances:

(1) all existing ITFS applicants, permitees, and licensees have been "grandfathered";

(2) at least 20 channels are reserved exclusively for ITFS;

(3) educators will be permitted for the first time to lease excess capacity so as to provide the potential for needed additional revenues;

(4) MDS applicants will receive only a conditional construction permit and must get an agreement in writing from the existing ITFS licensee before they can begin construction on the same channel or an adjacent channel;

(5) MDS applicants must protect ITFS operators against interference.

Finally, I must note that the Commission, in making its decision, had to give some weight to the lack of existing use of the ITFS spectrum. It is a significant argument that in a substantial number of states there are no channels in use and no applications on file.

While we cannot ignore the loss of potential for ITFS service resulting from this action, I strongly hope that the educational community will recognize the significant benefits which will accrue to the ITFS service as a result of this decision. We must all now look to the future and allot the highest priority to applying the ITFS

service as an innovative tool for making our nation more productive and our people better able to cope with a rapidly changing world.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

I concur in the "reallocation" of certain ITFS channels for multi-channel MDS use, but I do so with a number of reservations. In particular, while I agree with the allocation of spectrum for multi-channel use, I think the Commission could have accomplished this in a way which is both less intrusive to ITFS operators and at the same time better insures the viability of the multi-channel service which the Commission purports to create.

As to the effect on ITFS, for example, I do not understand the necessity for the creation of two four-channel MDS systems rather than one system. This Commission has often spoken of the proliferation of competition in the video marketplace. With this multitude of services, a single four-channel MDS system would face competition whether or not the Commission authorizes a second four-channel system. And obviously, the authorization of a single four-channel system would have had a substantially lesser impact on existing ITFS users, particularly if the Commission had reallocated the three under-used OFS channels for MDS use rather than dipping into the more heavily used ITFS channels. I wish these options had been seriously explored by the Commission staff.

However, having made the policy choice to "reallocate" enough spectrum for two multi-channel MDS systems, the Commission should have proceeded to make multi-channel MDS as viable as possible. But I am fearful that the Commission's decision, fashioned in the name of compromise, does not bode well for the timely creation of multi-channel MDS systems, at least in the major markets. And if it appears that the Commission has so burdened multi-channel MDS that it stands little chance of getting off the ground, then I believe that the Commission should reevaluate its allocation of ITFS spectrum to MDS.

The burdens on potential MDS operators in this oddly configured "reallocation" are numerous. For example, even the "winners" of MDS lotteries[1] win only the right to negotiate with co and adjacent channel ITFS licensees within a 50-mile radius of the MDS station.[2] In fact, MDS permittees, before they may begin construction, must submit a statement from those co and adjacent channel ITFS users

[1] The failure of the Commission to adopt lottery procedures now—which I believe the Commission could have done—also adds to the delay in providing multi-channel MDS service. I can only hope that the further notice proposing lottery can be completed expeditiously so that MDS service may be provided to the public in something approaching a timely manner.

[2] Report and Order at para. 85.

to the effect that "the operation of the multichannel MDS station will not interfere with the ITFS operation or that the ITFS operator would accept any interference that did occur."[3] Obviously this gives current ITFS operators something in the nature of a veto power over MDS systems, with the only bright spot in such a procedure being that the veto must be related to "harmful interference" to existing stations.[4] Thus, at least it would appear inappropriate under the negotiation process adopted by the Commission for an ITS operator to veto MDS systems simply because the ITFS operator does not agree with the programming proposed to be presented on the MDS system or for any reason other than a reasonable belief that the MDS system will interfere with the ITFS operator's existing facilities.[5]

In short, while I agree with the allocation of spectrum for multichannel MDS operation, I hope that the Commission has not preordained laggard construction and fitful performance by the multichannel systems; if the Commission has done so, then the disruption to existing ITFS users will have occurred for no reason.[6]

STATEMENT OF COMMISSIONER HENRY M. RIVERA CONCURRING IN PART, DISSENTING IN PART

RE: Report and Order in CC Docket Nos. 80–112 and 80–116.

This Report and Order has two principal aims: to create a new multi-channel video delivery service, and to assure adequate spectrum for future ITFS growth. With respect to these aims, the

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[3] *Id.*

[4] *Id.* Rather than this clumsy and laborious process, I would have preferred the application of the "last-in" theory familiar both to the Commission and to broadcasters. *E.g.*, Sudbrink Broadcasting of Georgia, Inc., 65 F.C.C.2d 691, 692 (1977). Under this more familiar procedure MDS systems could have been permitted to construct but would have been required to correct any harmful interference to ITFS operators.

[5] It is also important to emphasize my belief that the Commission's decision grandfathers only "existing" ITFS facilities, i.e., those which have been granted, those which are operating and those which have been applied for. To extend grandfathering to inchoate systems is to invite confusion and to delay even further the provision of multi-channel MDS service. *See* Report and Order at para. 85.

[6] I must disagree with one small aspect of the Commission's decision. Consistent with the decision in Amendment of Section 73.3597 of the Commission's Rules, ___ F.C.C.2d ___ (BC Docket 82–887, released December 2, 1982), the instant decision substitutes a "one-year" transferability rule for the "three-year" rule now in force at least for those licenses "that were obtained through comparative hearings." Report and Order at para. 144. While it seems unlikely that this rule will have much effect given the proposed application of lotteries to choose MDS permittees, I continue to believe that any such limitation on the free transferability of licenses "is wholly antithetical to the deregulatory philosophy of this Commission." Amendment of Section 73.3597 of the Commission's Rules, ___ F.C.C.2d at ___ (dissenting opinion).

decision represents a basically fair balancing of the interests of the affected spectrum users and I concur in most of it. However, the Commission erred in failing to precisely define and limit the degree to which ITFS licensees may lease "excess" capacity and I dissent to that part of the decision. As I have previously indicated,[1] I am concerned about the potential *de facto* spectrum reallocation made possible by the Commission's failure to adopt clear guidelines governing excess capacity leasing. If *de facto* reallocation occurs, one of the aims of this Report and Order—assuring adequate spectrum for future ITFS growth—will be thwarted. In view of the apparently intense outside commercial interest in these microwave frequencies, this issue will be far more than academic, at least in the long term, as ITFS usage multiplies. While I certainly do not wish to deprive ITFS licensees of the new income-producing opportunities extended other licensees, I am concerned that the Commission's laissez faire approach here will prove detrimental to our ability to manage the spectrum in the future.

I also emphatically dissent to the majority's decision to sidestep the media diversity issues inherent in the new "wireless cable service" provided by multichannel MDS. My fellow commissioners apparently believe that there is no place for such concerns in a common carrier service. I disagree. While MDS is nominally regulated as a common carrier service, the majority should have faced the fact that to the viewer, the wireless cable transmission is indistinguishable from other home video mediums, no matter what their regulatory classification.[2] To the viewer, it is all "television". Whether we care to acknowledge it or not, MDS transmissions can influence social, cultural, political and moral values to the same extent as conventional broadcast television. Given this reality, the Commission should have explicitly evaluated options to assure that the new multichannel service will optimally further the robust ideological diversity we have worked so long to achieve in broadcasting.

Common carriers, by law, may neither discriminate among those

[1] *See Report and Order Authorizing Shared Used of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities*, released April 15, 1983 (Docket 81–794) (Concurring Statement of Commissioner Henry M. Rivera).

[2] In point of fact, there is little apparent practical difference between MDS home video service and broadcast subscription television. In both services, a licensee typically leases transmission facilities to program distributors or their surrogates, whose goal is to reach as many members of the public as are willing to pay for the service. Neither service can be employed without special equipment. The STV licensee, unlike the MDS licensee, is entitled to deal with the lessee/programmer of its choice and is legally responsible for transmissions over its facility. However, the soundness of the disparate regulatory classifications applied to MDS and STV is open to question, given that an MDS licensee may lease most or all of its channel capacity to a single lessee. *See generally Report and Order* paras. 101–102; *Metrock Corp.*, 73 FCC 2d 802 (1979).

wishing to use their facilities nor exercise control over transmission content. At first blush, these limitations would appear to mitigate many of the concerns underlying structural and behavioral regulation of broadcast licensees, who do control channel access and transmission content. However, the theoretical programming diversity benefits of common carrier regulation are constrained in MDS. As an initial matter, our rules allow an MDS licensee to provide up to fifty percent of its transmission time to an "affiliated subscriber".[3] Although carriers are prohibited from influencing the content of such transmissions, the efficacy of such a prohibition upon affiliated entities is highly questionable. Where such substantial influence actually is exerted, the diversity-related virtues of common carrier regulation, as well as the classification of MDS as a common carrier, are frontally undermined.

The MDS licensee's apparent freedom to enter long-term contracts with a single customer as to one or more channels in a given local market also substantially curtails, if not eliminates, the diversity-related benefits common carrier regulation might otherwise be expected to provide. In such circumstances, the programmer-customer is functionally indistinguishable from a broadcast licensee. Unlike a broadcaster, however, its discretion over programming is completely unfettered. As a result, the public's exposure to the widest possible diversity of viewpoints may be diminished, despite the fact that authorization of multichannel MDS is intended to promote that goal.

In the broadcast arena, the Commission has traditionally held the view that programming diversity can most effectively be maximized by diversity of ownership and control of broadcast outlets. It has therefore placed heavy emphasis upon structural regulatory policies which, among other things, promote diversity of ownership in local markets through one-to-a-market, duopoly and media cross-ownership rules narrowing curbing local media combinations.[4] The media diversity objective underlying local ownership restrictions in the broadcast service is no less compelling in MDS, which is widely viewed as an alternative to conventional broadcasting, and whose regulatory status and configuration are murky at best. The fact that the FCC has elected to regulate MDS as a common carrier service

[3] *See* 47 C F.R. §21.903(b).

[4] Among the other structural broadcast regulatory rules and policies designed to promote programming diversity are those which proscribe regional broadcast ownership concentration, limit the total number of broadcast properties that can be commonly owned, emphasize diversification of ownership in the comparative licensing process, and mandate non-discrimination and affirmative action in broadcast employment. If the Commission had seen fit to examine more broadly the media-related implications of MDS and the policy options available to address those concerns, *see infra*, it could also have explored the extent to which the foregoing regulation should be applied to MDS.

simply does not negate the reduction in diversity of viewpoint that occurs when an entity obtains the unfettered right to program an MDS channel in a market where that entity already controls another mass communications medium or when a single entity obtains the right to program multiple MDS channels.[5] The majority has apparently blessed such anti-diversity combinations in MDS, essentially because restrictions "would prevent market forces from determining the optimum mix of channels." *See Report and Order* paras. 101–102.

For the reasons just outlined, the majority's failure to consider even minimal regulation in furtherance of First Amendment values was a serious mistake. The Commission could have easily provided a small measure of assurance that diversity would be furthered by formulating tariff requirements preventing MDS licensees from leasing channels to entities already owning other media interests in the same geographic market. Furthermore, the Commission could have considered tariff requirements precluding programmers from leasing more than one MDS channel per market. This would have demonstrated at least a minimal commitment to longstanding FCC policies in furtherence of diversity of voices within local markets. The Commission has previously confirmed its authority to reach the activities of a common carrier's programmer-customer through tariff provisions,[6] and it would not have been difficult to fashion such restrictions for MDS, whose service characteristics are reasonably well established.

The Commission could also have elected to fully explore what alternative or additional diversity-enhancing policies to apply to MDS in the further rulemaking notice to be issued regarding MDS lotteries. In the final analysis, this more comprehensive approach may well have been preferable. The options to be examined could

[5] Some of my colleagues contend that the FCC has never directly regulated programmers and that, therefore, regulation of MDS programmer-customers is legally foreclosed. Their basic operating assumption is incorrect. *Cf. Columbia Broadcasting System, Inc.* v. *FCC*, 629 F. 2d 1, 26 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981) (confirming FCC authority to apply Section 312(a)(7) to the major broadcast networks). However, there is a logical reason why the FCC ordinarily does not regulate programmers *per se*: its policies directly apply to the entities responsible for program selection and transmission, *i.e.* broadcast licensees. In any event, the Commission has broad discretion to regulate interstate communications by radio or wire to protect the public interest. *See, e.g.*, 47 U.S.C. §§ 152(a), 154(i), 303(g), 303(r); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). *See generally, National Broadcasting Co.* v. *United States*, 319 U.S. 190 209–21 (1943). In this instance, important policy objectives detailed previously counsel in favor of utilizing this broad discretion to impose diversity-related requirements upon MDS programmer-customers, either directly or indirectly.

[6] *See, e.g., Direct Broadcast Satellites*, 90 FCC 2d 676, 711 and n. 85 (1982). The Commission declined to impose limited broadcast-type regulation on DBS common carrier programmers because the service is novel and still in the developmental stage. *Id.* The same cannot fairly be said of MDS, which was created in 1974 and is currently provided in several markets around the nation.

have included various tariff prescriptions, including but not limited to those described above, a dual licensing scheme for MDS carriers and their programmer-customers, or reclassification of MDS as a broadcast service.[7] At the conclusion of that proceeding, if additional regulations were adopted, applicants could have been allowed to amend their applications to conform to these new rules as necessary.

My colleagues have not seen fit to follow either route, apparently out of fear that by doing so, the Commission would be expected to saddle MDS with the panoply of rules that apply to broadcast licensees. Any such fear was largely without foundation. This Commission has shown that it can be very creative in regulating the many communications services within its purview by rejecting outmoded or unnecessary rules while continuing those which further fundamental communications policy. That approach could have been followed here. Instead, the Commission essentially decided to remain blind to the actual service chracteristics of MDS and to important policy issues implicit in it. By blinking reality, the FCC has seriously undermined the credibility of its efforts to maximize diversity of ownership and expression. To this highly regrettable, if unexpressed, policy shift, I dissent.

[7] No doubt a variety of options exist—I am not particularly wedded to any one of the foregoing at this juncture.

Common Carrier
Common Carrier, International
International Communications

Notice of Inquiry adopted re integrated digital service networks (ISDN), its evolution, current standardization efforts and possible U.S. implementations.
–Integrated Services Digital Networks
GEN. Docket No. 83–841

FCC 83–373

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
INTEGRATED SERVICES DIGITAL NETWORKS (ISDN)	GEN Docket No. 83–841

NOTICE OF INQUIRY

(Adopted: August 4, 1983 Released: August 10, 1983)

BY THE COMMISSION:

I. INTRODUCTION

1. Currently, a world-wide telecommunications effort is underway to specify standards for integrated services digital networks (ISDN). An ISDN is a network which is designed and constructed to provide a wide range of telecommunication and information services and to transport electrical signals in digital, rather than analog, form. Participants in this effort include numerous countries, telecommunications entities and professional organizations. It is envisioned that an ISDN or ISDNs will evolve in each nation from its existing network(s). In the U.S., several ISDNs could emerge from existing privately-owned telecommunications networks. National ISDNs are expected to emerge and interconnect over the next two decades, as communications signals will be increasingly digital. In recognition of this trend, and also in recognition of the technological trend generally towards the use of digital technology in telecommunications, existing telecommunications providers have increasingly begun to construct and install digital components in their networks.

2. The purpose of this Notice of Inquiry (NOI) is to provide background on ISDN developments to date, and on related telecommunications policy, and to discuss various issues raised by the potential implementation of ISDNs. We shall seek comment on the

appropriate role for the FCC to play in the ongoing ISDN standards development effort.[1] In particular, we solicit comment on how the FCC should best continue to promote its pro-competitive policies as ISDN evolves. Furthermore, this NOI is intended as a clearinghouse for comments of U.S. telecommunications service providers, equipment manufacturers, users and the public.[2]

3. As noted, we are cognizant that international and domestic standardization efforts involving the U.S. government, telecommunications providers, large users, and foreign entities are presently underway.[3] We do not intend that this proceeding hinder or conflict with these ongoing efforts, rather, this NOI seeks to complement existing efforts. In addition, the NOI will serve as another vehicle to apprise the Commission and the public of concerns which U.S. service providers, equipment manufacturers, users and the public may have about implementation of ISDN networks.

4. ISDN will emerge from existing telecommunications networks and represent the next stage in the evolution of telecommunications. Initially, telephone networks were designed to transport voice signal information in analog form. As computers began to communicate with one another, computer information which was in digital form was transformed into analog form in order to be transported over existing analog networks intended for voice signals.[4] However, with

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[1] In a recently released report, the National Telecommunications and Information Administration (NTIA) concluded that: "because of the far-reaching impact of ISDN on competition, equipment and service trade, and U.S. technological leadership, it is important that the U.S. Government provide a reasonably specific policy framework on which future U.S. efforts to develop ISDN standards could be based. Toward this end the FCC, which is presently considering a Notice of Inquiry, should initiate it without delay." NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, LONG RANGE GOALS IN INTERNATIONAL TELECOMMUNICATIONS AND INFORMATION, 130 (1983).

[2] The NOI raises and discusses many ISDN-related issues. To facilitate comment, a partial list of issues discussed in the NOI is presented as Attachment I.

[3] These planning efforts are widespread and dynamic. Since 1976 the International Telegraph and Telephone Consultative Committee (CCITT) has been the focal point of international ISDN planning efforts. In the United States, telecommunications companies, private sector organizations and the federal government have participated in ISDN planning activities. *See* Section II for further discussion.

[4] Because the bulk of the network consists of circuits intended for transmission of voice, the transmission of signals in digital form is not as efficient as if the network were originally designed to handle digital signals. Most circuits designed for voice use frequency division multiplex (FDM) to achieve the composite signal necessary to modulate a carrier for the purpose of transmitting multiple conversations over a single path. Circuits intended for digital use usually employ time division multiplex (TDM) which simplifies the encoding of individual bit streams onto a single composite bit stream. While data signals in digital form can be used to directly modulate a carrier via the FDM process, there are distinct advantages to be gained by using TDM. The advantages also extend to voice signals, which are first sampled, then encoded as digital signals by a process such

rapid development of digital technology in the past three decades, voice and data communications were transported over both digital and analog media. During recent years many national networks rapidly moved toward transporting voice and digital signals on digital media. This trend toward digitalization is occuring because it is believed that digital networks may reduce costs, increase service quality and provide new services to the user.

5. ISDN continues the trend towards use of digital transport facilities. An ISDN is characterized by the provision of numerous services, from low speed alarms up to high speed broad-band video services, and end-to-end digital connectivity between users for both the transport of voice signals which have been originated electrically in digital form, and the transmission of digital signals themselves. ISDN will permit users to communicate via the network(s) by interconnecting through a select group of standardized, multi-purpose user access interface arrangements. Currently, technical standards of telecommunications equipment and facilities can vary within a national network and among various nations' networks. This lack of uniformity requires equipment manufacturers to construct, and may require some users to buy, equipment tailored to meet each differing standard. ISDN efforts are aimed at changing this situation. One objective of ISDN planners is the creation of model ISDN interface characteristics after which each nation would pattern its own ISDN or ISDNs. This uniformity would permit national ISDNs to interconnect and form a worldwide system or systems,[5] and would promote ubiquity of terminal equipment used therein. Thus, users in one country could use their telephones and terminals in any country and be able to communicate with users anywhere in the world. Although this uniformity would simplify the interconnection of ISDNs with other countries systems, there is a question as to whether a single standard or set of standards for specialized systems would be appropriate for some users.

II. ISDN PLANNING EFFORTS

6. ISDN planning efforts are underway within the United States and internationally. Domestically, several voluntary standards development organizations and federal agencies have been involved in ISDN efforts. Internationally, the International Telegraph and

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as pulse code modulation (PCM). PCM involves the conversion of an analog signal, such as voice, to a digital format. This is ordinarily accomplished by generating binary-coded pulses to represent the quantized amplitude samples of the analog signals. The process of encoding voice signals by PCM has been used for many years and where bandwidth problems are not too severe is the preferred method of transmission. Thus, many national networks have been gradually shifting to digital transmission.

[5] There appears to be a possibility that separate terrestrial and space satellite worldwide ISDNs could evolve.

Telephone Consultative Committee (CCITT) and the International Organization of Standardization (ISO) are involved in developing ISDN-related standards.[6] We shall discuss the international efforts first.

A. *International efforts*

7. CCITT provides the central forum for international planning and discussion of ISDN.[7] In 1976, the Sixth Plenary Assembly of the CCITT proposed that CCITT begin formally to study ISDN.[8] The Seventh Plenary Assembly met in 1980 and gave Study Group XVIII primary responsibility for establishing general ISDN standards and guidelines. Several other study groups have specific responsibilities. *See* Attachment II. In addition to its ISDN study groups, CCITT is generating and has generated other standards which may have some bearing upon implementation of ISDN.[9]

8. CCITT's ISDN efforts are aimed at specification of uniform ISDN Recommendations. These Recommendations are intended as an outline of an ISDN model which nations can adopt and adapt to meet their individual needs. This CCITT model is expected not only

[6] In addition, the Conference Europeene des Administrations des Postes et des Telecommunications (CEPT), the International Federation for Information Processing (IFIP), the European Computer Manufacturers Association (ECMA) and other agencies are also active in ISDN matters. CEPT outlined a common CEPT approach to ISDN in its Special Group ISDN (GSI) 1982 report on Integrated Services Digital Network Studies, Doc. T/CCH (82) 30, Doc. T/GSI (82) 71, Information for Industry, Stockholm, (November 1982).

[7] The CCITT is one of four permanent organs of the International Telecommunication Union (ITU). The ITU has 158 member countries of which the United States is one.

[8] CCITT's activities are structured around a four year cycle known as the "plenary cycle". CCITT establishes Study Groups to develop telecommunications disciplines or services. Study Groups convene, divide their subject into subparts and assign various groups of experts (working groups) questions to study and answer. These working groups meet, study their assigned questions and make recommendations to the Study Group. The Study Group convenes and reviews these recommendations and may adopt them. If adopted, the recommendations are then presented to the CCITT at the next Plenary Assembly. The CCITT Plenary Assembly convenes to review and approve or disapprove Study Groups' recommendations as well as plan the work to be undertaken during the next plenary cycle. Study Group recommendations which are approved by the Plenary Assembly become CCITT recommendations.

[9] For example, International Telecommunication Union, International Telegraph and Telephone Consultative Committee, Yellow Book, Volume III, Fascicle VIII.2, Data Communication Network Services and Facilities Terminal Equipment and Interfaces [hereinafter ITU Yellow Book Vol. III], Recommendation X.3 Packet assembly/disassembly (PAD) in a public network, at 10 (1980) outlines the interworking standards for start/stop mode data terminal equipment in a packet network. In addition, ITU Yellow Book Vol. III, Recommendation X. 25 Interface between data terminal equipment (DTE) and data circuit equipment (DCE) in the packet mode in public data networks, 100, Geneva 1976, (amended Geneva 1980) describes the interface standards for packet mode data terminal equipment in a packet network.

to detail the technical specifications of the ISDN network, but also to encompass all the facilities and equipment required by a user to gain access to the network.

9. In the seven years since CCITT began work on an ISDN model, much progress has been made. CCITT has developed, and continues to refine, its ISDN model. *See* Attachment III. Currently, the model has the user accessing the network through a series of defined interfaces. The user begins its call by using its telephone or terminal (denominated TE1). The call passes through two other interfaces (NT1 and NT2) before it is carried through the local loop[10] to the local exchange and onto the ISDN. In addition, CCITT has also begun to specify a system of protocols[11] for ISDN based upon the International Organization for Standardization's (ISO) open systems interconnection model (ISO/OSI). *See* Attachment IV.

10. The next CCITT Plenary Assembly will meet in November 1984. Initial recommendations which are submitted for final approval will be reviewed by the Plenary Assembly, and those that are approved will become CCITT Recommendations. It is envisioned than CCITT ISDN Recommendations will be relied upon by nations for the design and construction of their ISDN networks.

B. *Domestic efforts*

11. In the United States ISDN discussions and planning efforts are being carried on by groups in both the private and public sector. Among these groups are the United States Organization for International Telegraph and Telephone Consultative Committee (U.S. CCITT Committees, including the ISDN Joint Working Party), Federal Communications Commission, National Telecommunications and Information Administration, National Communications System, Defense Communications Agency, Electronic Industries Association, American National Standards Institute, and the Institute of Electrical and Electronics Engineers.

12. The United States Organization for International Telegraph and Telephone Consultative Committee (USCCITT) was established by the Department of State pursuant to the Federal Advisory

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[10] A local loop is a single channel connecting the customer and the local exchange office.

[11] Protocols have been described as: "the rules by which physically separated entities interact." Green, Introduction to Network Architectures and Protocols, IEEE Transactions on Communications, Vol. COM-28, No. 4, at 413 (1980). The Commission has described protocols as: "governing the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages." Amendment of Section 67.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 422 n. 37 (1980) (Final Decision), *reconsideration, aff'd sub nom.*CCIA v. FCC, 693 F 2d 198 (D.C. Cir. 1982), *cert. denied* 51 U.S.L.W. 3826 (U.S. May 16, 1983) (Nos. 82–1331 and 82–1332) [hereinafter *Computer II*].

Committee Act, Pub. L. No. 92–463, 86 Stat. 770 (1972), *as amended* Pub. L. No. 94–409 § 5[c], 90 Stat. 1247 (1976) to discuss and develop U.S. positions on matters before the CCITT. It consists of the U.S. CCITT National Committee (USNC) and four Study Groups. The USNC functions as a steering body over the four Study Groups and the ISDN Joint Working Party. Study Groups "A", "B", "C" and "D" are assigned specific topics. Study Group A is concerned with tariffs and service definitions. Study Group B examines terminal equipment and telex issues; C examines telephone matters; and D examines data networks and data communications matters.

13. In 1981, in response to the increased international ISDN activity, a domestic ISDN Joint Working Party (JWP) was established as an adjunct to the USNC. It was created to develop a domestic forum for discussion of U.S. positions on ISDN issues at CCITT, in view of the relevance of ISDN considerations to all four U.S. study groups. The JWP is chaired by a representative of the National Telecommunications and Information Administration (NTIA). The FCC, National Communications System and the Department of State, among other government agencies, participate in the JWP. In addition, many telecommunications companies and private sector organizations also participate in and make submissions to the JWP. If a contribution is approved by the JWP, it is coordinated with the appropriate Study Group and recommended for approval to the State Department as a U.S. CCITT contribution. If neither the JWP nor the appropriate Study Group approves a given contribution, the contributor may withdraw or revise its contribution or, if the contributor is recognized by the CCITT as a Recognized Private Operating Agency (RPOA) or a Scientific or Industrial Organization (SIO), it may submit its documents to CCITT Working Parties on its own motion but without the status of a United States government contribution.[12]

14. In addition to the FCC's involvement in the USNC and the Joint Working Party, the Commission established, in 1981, an intra-agency ISDN Coordinating Committee to monitor ISDN developments. During the last year and a half, observing that international ISDN planning efforts have accelerated rapidly, this Committee stepped up its own efforts to remain abreast of developments by participating more actively in international and domestic meetings.

15. In the private sector, voluntary standards-setting organizations composed of telecommunications professionals have been active. Organizations such as the Electronic Industries Association

[12] There are 18 U.S. companies accorded RPOA status. The American Telephone and Telegraph Company (AT&T) and various IRCs are RPOAs. IBM is recognized as a SIO. In addition to RPOAs and SIOs, CCITT Study Groups are open to International Organizations (*e.g.* ISO), Specialized Agencies (*e.g.* World meteorological Organization), and any administration of the ITU which wishes to participate.

(EIA), the American National Standards Institute (ANSI), and the Institute of Electrical and Electronics Engineers (IEEE) develop recommendations and may submit documents to the JWP and the ISO.

16. Telecommunications carriers, enhanced service providers, equipment manufacturers and user groups are also involved in the development of ISDN standards both on a national and international level. These businesses often prepare ISDN-related documents that they submit to standards setting organizations. They may also submit their contributions to the JWP for incorporation as a U.S. contribution or, if as previously stated, they are recognized RPOAs or SIOs, they may submit their contributions directly to CCITT.

C. *Status of planning efforts*

17. At least nine CCITT Study Groups are working on ISDN related matters. *See* Attachment II. These study groups prepare Draft Recommendations which are often subject to review and revision. Given the fluidity of the process and the scope of the subject, an overview of important CCITT ISDN actions will be presented.[13]

18. In 1980, the Seventh Plenary Assembly published Recommendation G.705[14] outlining conceptual principles which would guide the international development of ISDN. These principles mandate, among other things, that the ISDN will contain intelligence for the purpose of providing service features that may be contained in the customer's terminals or distributed throughout the network; that layered sets of protocols for various access arrangements to the ISDN will control the networks and may vary as a function of the services required and the status of the evolution of a nation's ISDN, and that new services should be compatible with 64 kbit/s switched digital connections.

19. Although CCITT's ISDN model will utilize a layered set of protocols, CCITT has not agreed upon a system for categorizing protocols for ISDN purposes. However, ISO's open system intercon-

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[13] The following section will discuss various proposed amendments and revisions of CCITT Recommendations and Draft Recommendations. These amendments and revisions are mentioned for illustrative purposes only, and the discussion of these documents is not intended to indicate nor represent the position of the FCC or the U.S.

[14] International Telecommunication Union, International Telegraph and Telephone Consultative Committee, Volume III, Fascicle III.3, Digital Networks Transmission Systems and Multiplexing Equipment, Recommendation G.705, Integrated services digital network (ISDN), at 65–66 (1980). As CCITT ISDN efforts continue draft recommendations which will alter Recommendation G.705 are being developed.

nection model (ISO/OSI), discussed in para. 9, is being utilized by CCITT as a framework for designing ISDN protocols.[15] The ISO/OSI model identifies seven protocol layers. *See* Attachment IV. The implementation of each protocol layer requires the utilization of each lower layer protocol. Layer one, physical control, is the most fundamental protocol level. It provides the mechanical, electrical, functional, and procedural characteristics needed to establish, maintain and release physical connections between the network termination and the exchange. While layer one establishes physical connections with the network termination and the exchange, layer four protocols provide control signals from user terminal to user terminal across the network, and layer seven protocols permit data to be combined, converted, calculated and processed to become new data.

20. A number of significant ISDN developments have occurred in 1983. Two of the more important CCITT meetings were those of the Kyoto Meeting of Experts in February and the Geneva Meeting of Study Group XVIII in June. These meetings resulted in a detailed outline of ISDN Recommendations which was accepted in draft form. *See* Attachment V. This outline covers a broad range of ISDN characteristics, including many aspects of the network. Various sections deal with terminology, evolutionary principles, service capabilities, protocol models, numbering-addressing-routing principles, performance objectives, user-network and inter-network interfaces as well as other ISDN topics. This outline, if adopted at the November 1984 Plenary Assembly, would serve as the basis for implementing ISDNs and shape future CCITT ISDN work.

III. FCC STATUTORY OBLIGATIONS IN AN ISDN ENVIRONMENT

21. The Commission maintains jurisdiction over U.S. domestic and international common carrier facilities and service providers pursuant to Title I and Title II of the Communications Act of 1934.[16] Under Section 214 of the Communications Act of 1934 as amended, 47 U.S.C. 214 (1976), the FCC authorizes service providers to extend, acquire, and operate facilities, and evaluates Section 214 applications to insure against excessive plant additions which will unduly expand the rate base, thus causing higher revenue requirements. In the last decade, the Commission has initiated international facilities planning processes to examine U.S. carrier traffic forecasts and

[15] Report of the Meeting of Group of Experts on ISDN matters of Study Group XVIII, Com XVIII, No. R 15-E. [hereinafter Kyoto Meeting of Experts] Draft Recommendation I.311, p. 139 (March 1983).

[16] Title III of the Act, 47 U.S.C. 301 (1976), *et. seq.*, extends the Commission's jurisdiction to radio and satellite facilities, covering common carriers to the extent that they hold radio licenses.

facility requests prior to the Section 214 authorization process. It has done so to provide overall policy guidance on the complex issues raised by large scale facilities investments, finding this approach preferable to reliance on *ad hoc* Section 214 oversight alone. In addition, the facilities planning process gives service providers the ability to develop long-term facilities plans and removes the uncertainty inherent in *ad hoc* authorizations.

22. A further basis for institution of this inquiry is the potential that our equipment registration rules (47 C.F.R. Part 68) may require amendment to accomodate digital interconnection with the telephone network in an ISDN environment. Since 1976, when the registration program initially became effective, most terminal equipment connected with the network has been registered as conforming with technical specifications to prevent harm, or has been used with registered protective apparatus. In some cases, we have considered use of tariff alternatives to registration of equipment under our rules, *see, e.g., Third Notice of Proposed Rulemaking*, Docket No. CC 81–216, FCC 83–268, 94 FCC 2d 5 (1983). While we do not decide here whether rule or tariff procedures would be appropriate for ISDN, it is fair to inquire in this proceeding, at least initially, whether such procedures may prove necessary or useful.

23. The Commission's jurisdiction over networks and service providers will remain unchanged by the evolution of ISDN. ISDN will require additional construction of facilities and service offerings. Thus, the Commission will continue to address policy issues and authorize facilities in an ISDN environment. While we do not seek to plan ISDN facilities, we here seek to review the large policy issues raised by ISDN at an early stage in the facilities planning cycle, rather than only acting on an *ad hoc* basis.

IV. FCC TELECOMMUNICATIONS POLICIES

24. The FCC was established to foster efficient nationwide and worldwide communications, and we have promulgated policies, discussed below, to meet that goal. We are faced with the challenge of ensuring that ISDN and other subsequent technological innovations are implemented on a national level in a manner that comports with our policies.

25. In response to dramatic technological change, the Commission has, over the last fifteen years, increasingly relied on the forces of the marketplace to complement traditional common carrier regulation, and to ensure that such regulation is not inappropriately or unnecessarily extended. The Commission, therefore, has promulgated pro-competitive policies and has begun to deregulate competitive telecommunications services. In a series of decisions the FCC has

fostered competition in the provision of customer premises equipment,[17] promulgated policies fostering new common carrier entrants,[18] permitted domestic resale and shared use[19] and authorized COMSAT to provide end-to-end service.[20] Although each of these decisions relates to a different aspect of common carrier operations, a single regulatory philosophy is common to them—a desire to foster competition while reducing governmental involvement.

26. In the last three years we have taken several significant steps to deregulate service providers such as resellers of domestic "basic" service[21] and "enhanced" service providers.[22] In *Computer II* the Commission classified communications services as being either basic services or enhanced services. Basic service is a common carrier offering of transmission capacity for the transport of information. Enhanced services are defined in § 64.702(a) of our rules as:

> . . .services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

In *Computer II*, the Commission retained Title II jurisdiction over basic services (including underlying basic services that support enhanced services), but found that enhanced services are not subject to Title II regulation. Thus, while the provision of basic services remained within Title II jurisdiction, the provision of enhanced services was deregulated.

27. Before deregulating enhanced services, the Commission considered the potential effect of such deregulation on competition and structured its decision to ensure that unregulated provision of enhanced service by common carriers would be fair. Tariff conditions were placed on all common carriers to assure that basic service providers that offered enhanced services would not gain unfair competitive advantage over enhanced service providers that did not

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[17] Carterfone, 13 FCC 2d 420 (1968); *see also*, Part 68 of the Rules and *Computer II*, *supra* note 11.

[18] *See* Second Report and Order in Domestic Communications, Satellite Facilities, 35 FCC 2d 844 (1972); Specialized Common Carrier Services, 29 FCC 2d 870, 920 (1971), *aff'd sub nom.*, Washington Utilities Transportation Comm'n v. FCC, 513 F2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); MCI Telecommunications Corporation v. FCC, 188 U.S. App. D.C. 327, 580 F.2d (1978), *cert. denied*, 439 U.S. 980 (1978).

[19] Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261 (1976), Resale and Shared Use, 83 FCC 2d 187 (1980).

[20] Authorized User Modification, 90 FCC 2d 1394 (1982), Authorized Entities and Users, 4 FCC 2d 421 (1966).

[21] Competitive Carrier, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (adopted February 17, 1983), FCC 83-69.

[22] Computer II, *supra* note 11.

own underlying transmission facilities. Common carriers which seek to offer enhanced services may do so subject to conditions which ensure that: a) costs of unregulated enhanced service offerings are not borne by ratepayers of carriers' regulated basic service; and b) a common carrier which provides enhanced services does not gain unfair advantage over an enhanced service provider that must purchase basic service from a common carrier.

28. All facilities-owning carriers must continue to offer such transmission facilities pursuant to tariff, and must take basic facilities to support their own offerings of enhanced services on the same tariffed basis as other competing enhanced service providers.[23] Thus, carriers owning underlying transmission facilities and providing enhanced services must "unbundle" their basic and enhanced service offerings. Since enhanced services are not subject to Title II regulation, carriers may not include their enhanced service offerings in their tariffs. Thus, the *Computer II* decision was designed to assure that basic services would be available to all enhanced service providers on the same tariffed basis, while establishing a dichotomy between the two types of services.

29. Under *Computer II*, American Telephone & Telegraph Company (AT&T) is subject to an additional structural requirement. Due to its market dominance, AT&T must establish a separate corporation to offer enhanced services and terminal equipment and must maintain structural separation between the separate corporation and the parent.[24]

30. The pro-competitive philosophy outlined above is also embodied in judicial and congressional actions. In the Modification of Final Judgment (hereafter *MFJ*) entered on August 24, 1982 in *U.S. v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 103 S. Ct. 1240 (1983), AT&T was required to alter fundamentally the structure and scope of its operations. Before the *MFJ*, AT&T owned and operated the long distance telephone interexchange facilities as well as twenty-one Bell Operating Companies (BOCs) which provide local exchange service. However, under the terms of the entered *MFJ*, AT&T consented to divest the BOCs. The BOCs will be limited to provision of exchange service, exchange and information access, provision of other natural monopoly services actually regulated by tariff, and the

[23] Computer II Reconsideration, *supra* note 11, at 75, n. 19.

[24] And the separate corporation must take transmission facilities under tariff. Furthermore, *Computer II* policies developed prior to divestiture impose separation requirements on the Bell Operating Companies (BOCs) in their entirety. However, post divestiture, as a result of the consent decree, AT&T will divest itself of its operating companies. The Commission recently released a Notice of Proposed Rulemaking to determine whether and to what extent the structural separation conditions established in *Computer II* should be applied to BOCs after divestiture. *Bell Operating Companies*, 48 Fed. Reg. 13056 (March, 29, 1983).

provision, but not manufacture, of terminal equipment (unless these restrictions are subsequently modified by the court). The Commission is examining the divestiture under its Section 214 aegis.

31. In 1981 Congress passed the Record Carrier Competition Act of 1981 (RCCA), Pub. L. No. 97–130, 95 Stat. 1687 (to be codified in ___ U.S.C. § 222) which increased competition by eliminating the statutory bar preventing Western Union Telegraph Company from providing overseas services and by mandating full interconnection of domestic and international record carrier facilities to provide universal customer access to any carrier network. Pursuant to the terms of the RCCA, the Commission has prescribed interconnection arrangements for international and domestic record carriers which require carriers to grant all other carriers equal interconnection with their respective networks. *Interconnection Arrangements*, 89 FCC 2d 928 (1982), *see* also, *MTS and WATS Market Structure Phase III*, C.C. Docket No. 78–72, FCC 83–178, Transmittal No. 33184 (released May 31, 1983).

V. ISDN PLANNING EFFORTS AND FCC TELECOMMUNICATIONS POLICIES

32. The concept of an integrated services digital network and CCITT's ISDN planning efforts present the U.S. public and private sectors with a host of issues. In order to facilitate identification and discussion of the issues, this section will describe the international ISDN planning environment, examine the interaction between international ISDN design and U.S. ISDN(s) structure,[25] explore the effects ISDNs could have on U.S. groups and discuss what role, if any, the FCC should have in this area.

33. As outlined in Part IV, the FCC, the Courts and Congress have promulgated pro-competitive policies to guide our nation's telecommunications structure as it evolves in the new technological era. While the Commission has no intention of unnecessarily regulating the development or implementation of U.S. ISDNs, we believe it essential that we should monitor the progress of various specification efforts which are underway to ensure that our pro-competitive policies are furthered and not inadvertently frustrated. To that end, we are of the tentative view that we must monitor and participate in the international specification efforts which are now underway.

A. *The international ISDN planning environment*

34. The international scope of ISDN planning efforts will naturally reflect the telecommunications policies and market struc-

[25] "U.S. ISDNs" refers to ISDNS which evolve from privately owned U.S. telecommunications networks and service providers. It is not meant to suggest governmental ownership or control.

tures of each of the participant countries. These participants have quite disparate domestic market structures.

35. Most telecommunications systems are owned and operated by national governments. Usually, these telecommunications systems are owned and operated by a ministry or Department of Post, Telegraph and Telephone (PTT). Countries relying on this system believe that telecommunications services can be most efficiently provided through a centralized administration-owned network. However, there are variations in this organizational structure. Recently, the United Kingdom's administration-owned telecommunication system was restructured and augmented with another telecommunications carrier. Other countries are also reviewing their telecommunications systems. While several countries have more than one entity involved in operating telecommunications networks, only the U.S., Canada and the United Kingdom have, or are considering, competitive entities. Some countries restrict provision of customer premises equipment to the entity or entities responsible for the provision of services while others permit multiple suppliers of equipment.

36. The United States is one of the world's leading users and exporters of telecommunications and data services, and the largest producer of telecommunications equipment.[26] Our telecommunications system consists of numerous service providers, including AT&T, the Bell System, Independents, international service carriers and a vibrant customer premises equipment market. Approximately $21.1 billion worth of U.S.-produced telecommunications and computer merchandise was exported in 1982.[27] The United States has long followed a private enterprise approach to the provision of public telecommunications services, and it promotes competition among telecommunications service providers in the belief that the resultant competition will benefit users in the form of decreased costs and increased choices and technological innovation.

37. Each nation involved in the ISDN planning process can be expected to work towards shaping ISDN to reflect its telecommunications market structure and philosophy. From the point of view of countries which promote a single, universal telecommunications system, ISDN could be considered an extension of existing centralized telecommunications systems. Viewed from this perspective, it

[26] Grabhorn, Changes Ahead in World Telecommunications, Telephone Engineer & Management, vol. 87, no. 2, at 71 (1983).

[27] *See* U.S. Dept. of Commerce, Bureau of Industrial Economics 1982 U.S. Industrial Outlook, chs 24–26 (Jan. 1982). These exports brought a positive balance of trade of approximately $10.5 billion in 1982. The export and balance of trade figures cited above have been derived by aggregating industry statistics from the following Standard Industrial Classification (SIC) codes; SIC 3573 Electronic Computing Equipment; SIC 3661 Telephone and Telegraph Equipment; SIC 3662 Radio and Television Electronic Communications Equipment, and SIC 367 Electronic Communications Components.

appears logical for ISDN to support most, if not all, services. However, the United States' reliance on numerous telecommunications service providers that are subject to varying degrees of regulation for the provision of basic and enhanced telecommunications services, and our belief that competition among them benefits the public, requires that ISDNs operating in the United States be designed to accomodate our multiple service providers while still attempting to achieve the asserted benefits that ISDN promises.

38. This potential disparity in underlying policy necessitates that competing interests be accomodated in the CCITT's planning activities. Both the Kyoto Meeting of Experts and the Geneva Meeting of Study Group XVIII have produced documents that appear to take into account the different requirements of many countries.[28]

B. *The interaction between the CCITT's ISDN design and U.S. ISDNs*

39. To date, much of CCITT's specification efforts have been directed toward defining and outlining the ISDN and related user interfaces. The issues of how telecommunications functions will be apportioned between the ISDN and the user have begun to be addressed in international forums. However, these issues are closely related to the architecture of an ISDN, since the design of an ISDN and the services it will perform are interdependent.

40. The CCITT is seeking in its ISDN efforts to produce and adopt a set of ISDN specifications through a series of Recommendations. If the CCITT continues to pursue its present course, these Recommendations will outline performance specifications and will apportion telecommunications functions between the ISDN network and the user. For example, performance standards such as bit speed and bit error rates will have to be specified so that information can be efficiently sent from a terminal through the ISDN and to a designated terminal. In addition, CCITT's ISDN planning efforts will include the adoption of a protocol model and the apportionment of protocol handling between the network and the user. The CCITT may also recommend the degree of control the network users have to select and use network and non-network services according to a consensus on what functions the ISDN network should be allowed to perform and which are best left outside the network.

41. The recommendations CCITT formulates will directly affect U.S. ISDNs, service providers, equipment manufacturers and users.

[28] The Kyoto Meeting of Experts, Draft Recommendation I.120, p. 218, 219 (March 1983) explicitly recognized that: "Other arrangements corresponding to national variants may comply partly or wholly with CCITT Recommendations on ISDN." Although this particular language was omitted in Geneva, many other draft recommendations acknowledge that nations may implement various portions of national ISDNs differently.

In order to interface with the ISDNs of other nations, a nation's ISDN(s) must be compatible with them at the point of interface. ISDNs will have to be designed to transmit data through interfaces with other nations' ISDNs in formats which are compatible with, or convertible to, internationally agreed upon specifications, to permit interworking. If the technical specifications of one nation's ISDN(s) vary from those of other nations, it might require translation in order to interface with other ISDNs. Absent such translation, non-conforming ISDNs would probably be unable to interface with other ISDNs.

42. CCITT ISDN planning efforts are designed to produce a uniform set of technical specifications which extend from the network down to customer premises equipment. However, in the U.S., competitive market forces could result in some deviation from these standards. If, in the U.S., customer premises equipment were to operate at standards which were technically incompatible with or inferior to CCITT adopted standards, it could result in traffic being restrictd to domestic termination points, unless an additional layer of hardware and/or software could be added. Some CCITT schematics recognize this possibility by including a terminal adapter for this purpose. *See*, Attachment III. We invite comment on the relationship between the CCITT's ISDN planning efforts and the design of U.S. ISDNs. In addition, we solicit comment on whether this hardware and/or software is technically and economically feasible. Further, we request comment on whether specifications of this adapter, if done through voluntary standard setting activities, would as a practical matter be adhered to absent governmental involvement and/or whether Commission involvement in this area is necessary.

43. As discussed in para. 26, *Computer II* divided telecommunications services into two categories, basic and enhanced services. At the Geneva Meeting of Study Group XVIII, Draft Recommendation I.200, Temporary Doc. No. 38-E, p. 11 (June 1983) [hereinafter Draft Recommendation I.200] created two categories of services that ISDNs would perform or support: (1) bearer services; and (2) telecommunications services. Bearer services may generally be described as those services that provide the capability for information transfer between ISDN interfaces (transport services) and defined in protocol layers 1–3. *See* Attachment IV. Telecommunications services are those that provide the capability for communications between users of specific user terminals. Both types of services may be provided within or outside an ISDN. We solicit comment on whether the bearer/telecommunications services approach can readily accomodate our market structure (which is comprised of multiple service providers offering regulated and unregulated services in an unbundled manner) and telecommunications policies.

44. The most practical approach to planning an ISDN model would seem to be one that accomodates the interests of U.S.

telecommunications service providers, equipment manufacturers and users during the international planning phase.[29] In particular, it would appear important to U.S. telecommunications service providers and users that CCITT's technical ISDN standards not preclude or restrict service providers' ability to interface with the other nations' ISDNs nor adversely affect users' ability to select among numerous service providers.[30] Unless an ISDN model is designed with sufficient flexibility, both U.S. and foreign users could be precluded from, or limited in, their ability to specify the service providers and services they wished to utilize. Also, users might register concern over whether ISDN will be designed to technically and economically accomodate private leased lines. If ISDNs cannot or are not designed to meet the needs of private leased line users, the question then becomes whether a circuit and/or packet switched network could provide suitable alternatives. For instance, would the substitution of permanent virtual circuits for private lines, satisfy current private line users? Is there some reason for the U.S. to seek, as a policy objective, the continued availability of dedicated leased channels in an ISDN environment? In addition, are there any ISDN developments which the Commission should be aware of that have, or could, raise issues of U.S. national security? We request comment on these issues. In addition, we solicit comment identifying other possible areas of U.S. concern; how U.S. interests can be affected by international ISDN standards, and how our interests can best be accomodated.

C. *Impact of various types of ISDNs on U.S. service providers, equipment manufacturers and users*

45. Competition among service providers and unrestricted user access to their basic service offerings are the cornerstone of our procompetitive policies and goals. As indicated in paragraphs 24–31 *supra*, the Commission, Congress and the Courts have established

[29] As discussed in para. 38, various draft recommendations appear to recognize the need to accomodate varying national implementations of ISDN.

[30] The United States, with our diversity of service providers, might not be able to conform to a technical specification that nations with a centralized telephone network could meet. For example, in the United States, the users' ability to utilize numerous service providers and the geographic span of the U.S. network often result in calls being routed over a higher number of connections than in other countries. Each connection adds to the time which it takes to complete a call. Thus, a specification, such as timing, which could be conformed to over a limited number of connections might prove impossible to conform to in our country. In addition, satellite common carriers could be precluded from relaying traffic from national satellite systems if restrictive time specifications were adopted which would have the effect of prohibiting "double hop" situations. Thus, if CCITT were to adopt a standard that might be too restrictive, and if U.S. service providers were to be bound by such a standard, they could be limited in the number of services they could provide, and users could be restricted in the routing and number of service providers they might utilize.

the framework for how these goals can be attained through initiatives such as *Computer II*, the *MFJ*, the RCCA and the *Interconnection Arrangements* decision.

46. As discussed in para. 28 *supra*, *Computer II* requires all facilities-owning carriers to continue to offer basic services under tariff. Common carriers owning underlying transmission facilities are required to offer their basic services as discrete services separate from their enhanced service offerings. Thus, under the regulatory framework of *Computer II*, users may obtain a carrier's pure transmission capability unencumbered by any enhanced services the carrier may offer. Maintenance of this transmission capability is the cornerstone of our efforts to foster the provision of numerous services on a competitive basis.

47. It is important, therefore, that ISDNs be implemented in the U.S. in a fashion which is consistent with our *Computer II* decision and other competitive policies. Pursuant to *Computer II*, basic services may be provided over ISDNs and ISDNs may also form the building blocks for provision of enhanced services.

48. *Computer II* and the *MFJ* will militate towards implementation of ISDNs in the U.S. which provide solely basic services and ISDNS which provide the user with the option of selecting its unbundled basic and enhanced service offerings. Pursuant to *Computer II*, AT&T may only provide enhanced services through a separate subsidiary. Thus, AT&T's interexchange facilities will function as an ISDN providing basic services alone, rather than supplying basic and enhanced services within its ISDN. Provisions in the *MFJ* may restrict the ability of the BOCs to support fully a non-basic ISDN. *See MFJ* Sections II.D and IV.I-J, 552 F. Supp. at 227–29. Furthermore, as noted, we are considering whether *Computer II* conditions now applicable to the BOCs should continue to be applied after divestiture. Other carriers will be able to establish ISDNs which provide both basic and enhanced service providing they comply with the service unbundling requirements outlined in *Computer II*.

49. U.S. ISDNs must evolve under a structure which accommodates our multiple vendor telecommunications market and our pro-competitive policies. Our regulatory framework is sufficiently flexible to permit existing carriers and enhanced service providers the ability to develop ISDN configurations with minimal additional capital investment and disruption of service, and would permit new telecommunications entities the option to provide a variety of services to users. In addition, users will retain their ability to select among basic service providers, determine which, if any, enhanced services they require, and decide which enhanced service providers they will use. This degree of selection will result from the users' ability to use an ISDN(s) for basic services and to supplement these basic services to meet their enhanced service needs. Users will be the

ultimate beneficiaries of an ISDN environment which accommodates the multi-vendor/multi-service environment fostered by our competitive policies.

50. As ISDNs evolve, the entire U.S. telecommunications market—service providers, equipment manufacturers and users—will be affected. We solicit comment on the potential impact of ISDN, as discussed in para. 49 *supra*, and request comment on additional ways in which ISDN could affect U.S. service providers, equipment manufacturers and users. These comments will help clarify various U.S. interests, which is essential if our interests and policies are to be effectively communicated internationally.

51. The challenge that confronts both the U.S. public and private sectors is the need to communicate our interests and policies effectively in international forums so that our needs can be accommodated during the planning phase in the design of an ISDN model. Section D will discuss what role, if any, the FCC should have in furthering our pro-competitive policies in an ISDN environment.

D. *Furthering pro-competitive policies in an ISDN environment*

52. As discussed in para. 35 *supra*, most foreign countries' telecommunications systems are government owned and they are operated by PTTs. Many of these nations do not place the same importance on competition as does the United States. Those countries may not have the same incentives to design an ISDN capable of accommodating interconnection by multiple service providers. If U.S. interests are to be taken into account in the international planning process, it would seem that the U.S. service providers, equipment manufacturers, users and the federal government would have to identify areas of concern and then make U.S. interests known.

53. This process of identification of U.S. interests and concerns on ISDN requires both public and private sector participation. As outlined in Part II, numerous groups from both sectors are actively involved in ISDN-related matters, and in particular, the Department of State's ISDN Joint Working Party provides a public forum for service providers and users to discuss their views.

54. One of the purposes of this NOI is to discuss the appropriate role of the FCC in ISDN matters. The Communications Act of 1934 charges the FCC with the responsibility for ensuring that construction of new facilities and the provision of regulated services are in the public interest. Pursuant to the Act, the Commission has adopted pro-competitive communications policies which mandate that marketplace forces be allowed to determine, to the maximum extent possible, the best methods of providing service to users. Thus, we believe that any FCC involvement in ISDN specification activities should be designed to complement existing planning efforts, with the

objective of fostering our domestic and international United States telecommunications policies, and not directed to the design considerations involved in the ISDN specification process as such. For example, it is not our intention to hinder the progress of international activities or unilaterally impose standards in lieu of CCITT's efforts. Rather, it is our tentative view that the public interest would best be served by assuring that U.S. policy is understood by all participants in the ISDN specification process, to the end that it will be accommodated in this process.

55. In order for the Commission effectively to continue to foster its pro-competitive policies, it appears necessary for us more actively to monitor and participate in international and domestic ISDN specification activities, with the focus noted above. Correspondingly, it would also be necessary for the Commission to become increasingly aware of the views of U.S. service providers, equipment manufacturers, users and the public on this matter. Therefore, we solicit comment on how the FCC can best ensure that ISDNs are structured to foster competition and serve the public interest. We request comment on how the competitive nature and structure of U.S. telecommunications can best be maintained without unnecessarily diminishing any alleged efficiencies which may be inherent in uniform ISDN specifications. In addition, we more specifically solicit comment on how the specification of ISDNs may best conform to the regulatory scheme adopted in *Computer II*. Furthermore, we request comment on how the Commission best can continue to promulgate pro-competitive policies as ISDN develops and how we can best represent divergent interests of U.S. service providers, equipment manufacturers, users and the public at international forums. We also expect that this NOI will generate comment on what short and long term ISDN goals the FCC should set for itself.

56. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 218, 303(g) and 403 of the Communications Act of 1934, 47 U.S.C. 701 (1976) that the aforementioned inquiry IS HEREBY INSTITUTED.

57. IT IS FURTHER ORDERED that the Secretary shall cause this Notice of Inquiry to be published in the Federal Register.

58. Interested parties may file comments 45 days from date of publication of the Notice in the Federal Register. Reply comments must be filed 60 days from the date of publication of the Notice in the Federal Register.

59. IT IS FURTHER ORDERED that the Commission's staff is hereby delegated authority to expeditiously compile a full and complete record of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

ATTACHMENT 1

ISDN will affect U.S. service providers, equipment manufacturers,

and users. This Notice of Inquiry (NOI) has examined some of the issues which ISDN will present. In order to facilitate discussion, we have compiled a partial list of the issues discussed in the NOI. We do not intend to restrict comments to these subjects, rather, we are providing this to highlight certain salient questions with the expectation that it will provide a starting point for discussion. Comments which pinpoint specific issues and contain concrete recommendations are essential to the proper functioning of the proceeding.

1. ISDN planning efforts are currently underway in a number of national and international forums. Are there definable U.S. interests which are being, or could be, adversely affected by ISDN? In addition, are there any ISDN developments which the Commission should be aware of that have, or could, raise issues of U.S. national security? Are the interests of U.S. service providers, equipment manufacturers and users being represented or underrepresented? How can the FCC best assist in U.S. efforts to formulate a coordinated ISDN policy and represent U.S. interests? Do the technical specifications raise policy issues? If so, what issues are involved?

2. U.S. telecommunications policy is designed to promote a competitive U.S. telecommunications system. As part of this policy, we have taken steps to eliminate barriers to market entry and taken other measures to foster a marketplace with numerous interconnected telecommunications service providers. How can the FCC continue to promote competition in an ISDN environment? Could ISDN specifications be inconsistent with U.S. telecommunications policies? How can we ensure ISDN will be compatible with our telecommunications policies and objectives? How can ISDNs be designed to accommodate the U.S. web of numerous service providers?

3. Do the international ISDN draft recommendations appear to be sufficiently flexible to accommodate the regulatory structure outlined in *Computer II* and the Modified Final Judgment? If not, in what areas should the FCC concentrate its efforts to assure U.S. policies are accommodated?

4. The Communications Act of 1934 created the FCC for the purpose of making available to our citizens a rapid, efficient, low cost, nationwide and worldwide communications system. What ISDN issues must be addressed in order for the Commission to carry out this obligation? Is FCC guidance necessary or desirable? What sort of guidance should we provide? What form should this take? What should the Commission's short-term and long-term ISDN objectives be, and how can they be achieved? The Commission has many administrative procedures available by which ISDN could be addressed. Should ISDN-related issues be considered in rulemaking proceedings

and/or in *ad hoc* processes such as facility authorizations and tariff filings?

5. How will ISDN affect U.S. users, service providers and equipment manufacturers? How could U.S. users, service providers and equipment manufacturers benefit from ISDN? What services and benefits are unique to ISDN? What trade-offs are involved? Could ISDN specification efforts adversely affect users' ability to select service providers and services they wish to utilize? How will the development of ISDN affect private networks? Will ISDNs be designed to technically and economically accommodate existing services, such as private lines? Would the implementation by an ISDN(s) of a substitute service for private lines, such as permanent virtual circuits, satisfy current private line users? Is there some reason for the U.S. to seek, as a policy objective, the continued availability of dedicated leased channels in an ISDN environment?

6. ISDN specification efforts are aimed towards creating a uniform set of worldwide technical standards. To what extent should U.S. ISDNs conform to those standards? Are there technical, economic, or regulatory considerations which would mandate deviation from those standards? If so, to what extent is nonconformance possible or desirable?

ATTACHMENT II

CCITT STUDY GROUP ACTIVITIES

STUDY OF THE INTEGRATED SERVICES DIGITAL NETWORK (ISDN)

Examination of the Questions drafted by Study Groups III, IV, VII, XI, XVII and XVIII reveals that each Group intends to study various aspects of the ISDN. In order to avoid overlapping and possibly conflicting results the VIIth CCITT Plenary Assembly agreed that the areas of responsibility for the study of ISDN should be assigned as follows:

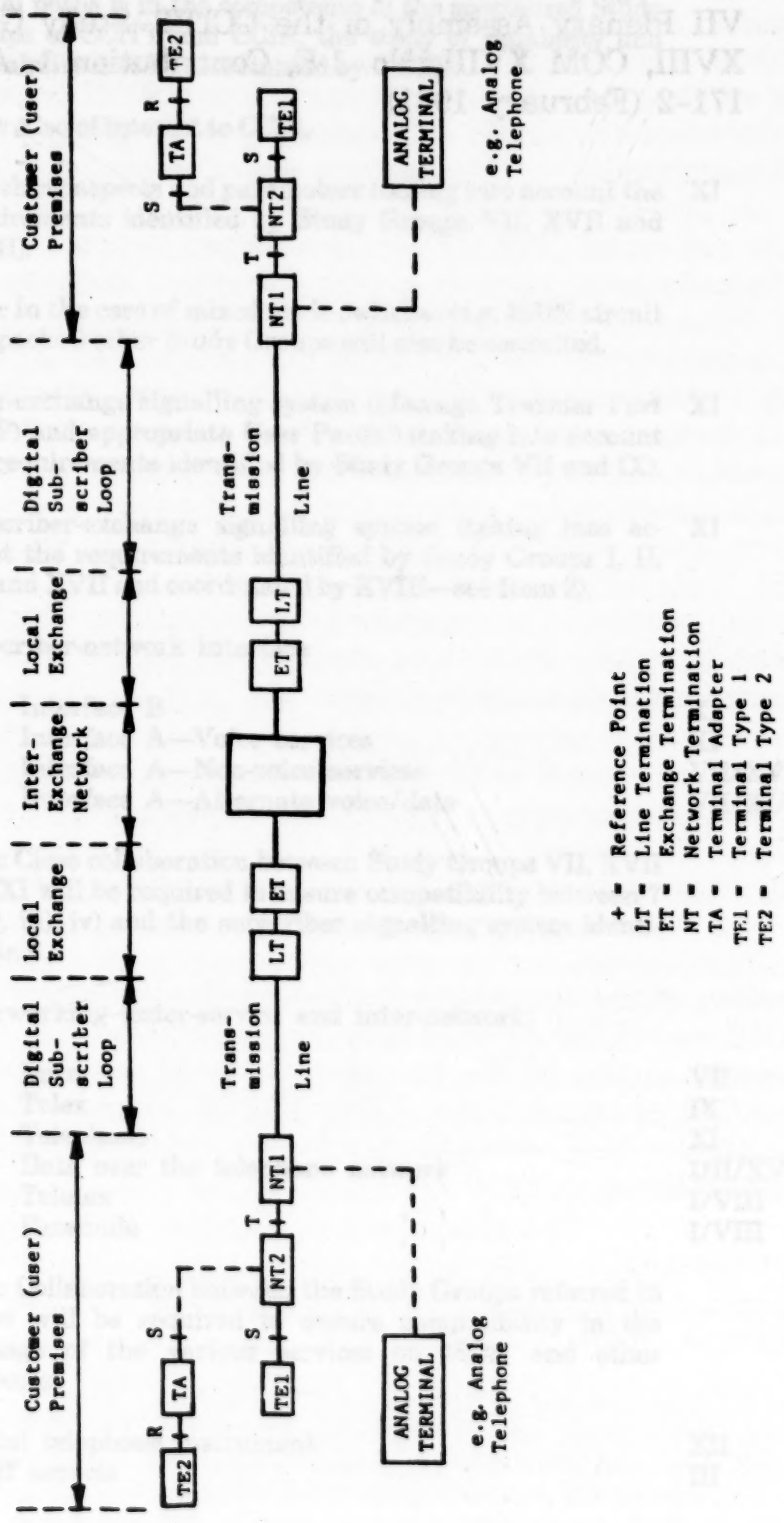
1.	Services and facilities interpretation and coordination (taking into account the requirements identified by Study Groups I, II, III and VII).	XVIII
2.	General ISDN aspects and guidelines, quality of service, numbering, performance targets, maintenance principles and miscellaneous subjects not more specifically identified (taking into account the requirements of Study Groups I, II, IV, VII, XI, XVII, and CMBD).	XVIII

Note: It is considered that Items 1 and 2 above are of high priority.

3.	Digital transmission standards and performance (local and inter-exchange). The study of hypothetical reference digital paths is in the competence of the specialized Study Groups of CCITT and CCIR, the study of reliability and availability is to be coordinated by CMBD.	XV/XVIII
	Note: Also of interest to CCIR.	
4.	Switching aspects and parameters (taking into account the requirements identified by Study Groups VII, XVII and XVIII).	XI
	Note: In the case of mixed mode switches (e.g. ISDN circuit and packet) other Study Groups will also be consulted.	
5.	Inter-exchange signalling system (Message Transfer Part (MTP) and appropriate User Part(s)) (taking into account the requirements identified by Study Groups VII and IX).	XI
6.	Subscriber-exchange signalling system (taking into account the requirements identified by Study Groups I, II, VII and XVII and coordinated by XVIII—see Item 2).	XI
7.	Subscriber-network interface	
	i) Interface B	XI
	ii) Interface A—Voice services	XI
	iii) Interface A—Non-voice services	VII/XVII
	iv) Interface A—Alternate voice/data	VII/XI/XVII
	Note: Close collaboration between Study Groups VII, XVII and XI will be required to ensure compatibility between 7 i), ii), iii), iv) and the subscriber signalling system identified in 6.	
8.	Interworking (inter-service and inter-network)	
	i) Data	VII
	ii) Telex	IX
	iii) Telephone	XI
	iv) Data over the telephone network	I/II/XVII
	v) Teletex	I/VIII
	vi) Facsimile	I/VIII
	Note: Collaboration between the Study Groups referred to above will be required to ensure compatibility in the carriage of the various services on ISDN and other networks.	
9.	Digital telephone instrument	XII
10.	Tariff aspects	III

SOURCE: International Telecommunications Union, International Telegraph and Telephone Consultative Committee, VII Plenary Assembly of the CCITT, Study Group XVIII, COM XVIII, No. 1-E, Contribution 1, Annex, 171–2 (February 1981).

ATTACHMENT III



ATTACHMENT IV

APPLICATION LAYER (layer 7)

Layer 7 is the source of data, usually consisting of services which process data (i.e. data are combined, converted, calculated and processed to create new data). Airline reservations and on-line banking are just two examples of possible user applications.

PRESENTATION LAYER (layer 6)

Layer 6 provides data formats and data information, if needed. Examples of presentation layer services are data translation, data encoding/decoding, and command translation for virtual terminals.

SESSION LAYER (layer 5)

Layer 5 establishes, maintains, and terminates logical connections for the transfer of data between processes. Examples of session layer services are: dialogue control, message unit flow control, and segmentation of message data units.

TRANSPORT LAYER (layer 4)

Layer 4 provides end-to-end control signals from user terminal to user terminal across the network (e.g. network acknowledgment or received information).

NETWORK LAYER (layer 3)

Layer 3 provides the control needed for call establishment and clearing through the switching network nodes.

DATA LINK LAYER (layer 2)

Layer 2 protocols provide reliable transmission over a single data link including frame management, link flow control, and the link initiation/release procedures.

PHYSICAL LAYER (layer 1)

Layer 1 provides the mechanical, electrical, functional, and procedural characteristics needed to establish, maintain, and release physical connections between the network termination and the exchange.

SOURCE: International Organization of Standardization, Second Draft Proposal ISO/DP, ISO/TC, 97/SC 16 N 719 (August 6, 1981); Robin, Treves, An Introduction to Integrated Digital Networks, Electrical Communication, Vol. 56, No. 1, pp 14–15 (1981).

ATTACHMENT V

SOURCE: Report of the Meeting of the Group of Experts on ISDN matters of Study Group XVIII, Com XVIII, No. R 15-E, Draft Recommendation I. 110, p. 212 (March 1983).

Draft Recommendation I.110

GENERAL STRUCTURE OF THE I-SERIES RECOMMENDATIONS

PART I - GENERAL

Section 1 - Frame of I-Series Recommendations; Terminology

I. 110 General Structure of the I-Series Recommendations
I. 111 Relationship with other Recommendations relevant to ISDNs
I. 112 Vocabulary (with Annex: Glossary of ISDN-terms)

Section 2 - Description of ISDNs

I. 120 Integrated Services Digital Networks (ISDNs) (present G.705)

PART II - SERVICE CAPABILITIES

I.200 The structure is for further study. The contents could cover the following items:*)
- concept of services, functional elements, etc.
- information types
- compatibility checking
- connection types (e.g. circuit and packet switched, etc.)
- user-to-user signalling
- tariff principles (refer to D-series)
- charging functions
- additional network capabilities (e.g. closed user group).
- terminal portability

I.2xx Services supported by an ISDN

PART III - OVERALL NETWORK ASPECTS AND FUNCTIONS

Section 1 - Reference models

I.310 ISDN functional architectural model
I.311 ISDN protocol reference model

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*) - To be revised in accordance with the results of WT3 or 4

I.312 ISDN Hypothetical reference connections

Section 2 - Numbering, addressing and routing

I.320 ISDN numbering and addressing principles
I.321 ISDN routing principles
I.3xx Network connection types

COM XVIII-No. R 15-E

Section 3 - Overall performance objectives

The structure and contents are for further study. The following is given as an example:
I.330 Overall performance objectives relating to circuit switched connections
The structure is for further study. The contents could cover the following items:
- overall error performance (cf. G.821)
- overall controlled slip rate objectives (cf. G. 822)
- overall availability
- call set-up and clear-down time
- overall blocking probability etc.

I.331 Performance objectives relating to packet switched connections
The structure is for further study. The contents could cover the following items:
- overall error performance
- overall availability
- overall packet transfer delay
- overall packet loss probability etc.

Section 4 - Overall testing and maintenance principles

The structure and contents are for further study. (See also G. 704, X.150)

Section 5 - Evolution

The structure and contents are for further study.

PART IV - USER-NETWORK INTERFACES

Section 1 - ISDN user-network interfaces

1. *General*

I.410 General aspects and principles relating to Recommendations on ISDN user-network interfaces (I.XXW)
I.411 ISDN user-network interfaces - reference configurations (I.XXX)
I.412 ISDN user-network interfaces - channel structures and access capabilities (I.XXY)

Section 2. Application of I-series Recommendations to ISDN user-network interfaces

The intention of this sub-section is to identify the relevant I-Recommendations that constitute particular ISDN user-network interfaces.

I.420 Basic user-network interface
I.421 Primary rate user-network interface
I.42x C channel user-network interface

User-network interface for other channel structures (for further study).

Section 3 ISDN user-network interfaces: Layer 1 Recommendations.

The structure and contents are for further study. One example is as follows:

3. *General*

I.430 General aspects and structure of Layer 1 functions and protocols
- layer service characteristics
- modes of operation, e.g. point-to-point, point-to-multipoint
- requirements for specific user-network interfaces

3.1 *Basic user/network interface*

I.431 Basic user/network interface - Layer 1 specification
- functional characteristics
- procedural aspects
- mechanical aspects
- electrical aspects
- maintenance aspects

3.2 *Primary rate user-network interface*

I.432 Primary rate user-network interface - Layer 1 specification (see 3.1 above for aspects to be considered)

3.3 *C-channel user-network interface*

I.43x - C-channel user-network interface - Layer 1 specification (See 3.1 above for aspects to be considered)

Section 4 - ISDN user/network interfaces: Layer 2 Recommendations

4. *General*

I.440 General aspects and structure of Layer 2 functions and protocols (could include reference to a simplified subset)

4.1 *Layer 2 specification*

I.441 Specification of Layer 2 protocol (Provisionally Q.920)
- layer service characteristics
- methods of operation
- overview description of Layer 2 functions and procedures
- frame structure
- elements and description of the procedures
- procedure-oriented and state-oriented graphical presentation
- maintenance aspects
- performance characteristics

Section 5 - ISDN user/network interfaces: Layer 3 Recommendations

5. *General*

I.450 General aspects and structure of Layer 3 functions and protocols (will include reference to protocols for connections of PABX, LAN, etc. and could include reference to a simplified subset)

5.1 *Layer 3 specification*

I.451 Specification of Layer 3 protocol (provisionally Q.930)
- layer service characteristics
- definition and function of information elements
- formats and codes
- call control procedures (overlap with I. 472 needs resolution)
- procedures for additional user facilities
- maintenance aspects
- modes of operation of the procedures, e.g. point-to-point and point-to-multipoint
- performance characteristics

The structure and contents of the Recommendations concerning protocols for connection of PABX, LAN, etc. are for further study.

Section 6 - User related testing and maintenance principles

I.460 The structure is for further study. The contents could cover the following items:
- user related testing and maintenance principles
- test loops

- fault conditions and alarms
- testing procedures etc.
(cf. G.704, X.150)

Section 7 - Support of existing interfaces

7. *General*

I.470 General (this section refers only to CCITT recommended interfaces)

7.1 *Support of X.21 and X.21bis DTEs*

I.471 Support of Recommendation X.21 and X.21bis DTEs by an ISDN *).
- hypothetical reference connections
- D-channel services
- mapping of X.21 and X.21bis interface signalling procedures to the D-channel services
- rate adaption and TA operation to effect synchronization

7.2 *Support of X.25 DTEs*

I.472 Support of Recommendation X.25 DTEs by an ISDN*
- hypothetical reference connections
- principles for DTEs accessing the B-channel (overlap with I.451 needs resolution)
- principles for DTEs accessing the D-channel (overlap with I.451 needs resolution)
- B/D-channel call handling

7.3 *Support of V-series DTEs by an ISDN*

I.473 Support of DTEs recommended in the V-series by an ISDN
- hypothetical reference connections
- principles for DTEs accessing the B-channel
- principles for DTEs accessing the D-channel
- rate adaption and TA operation to effect synchronization

PART V - INTERNETWORK INTERFACES

I.500 The structure is for further study. The contents could cover the following items:
- principles
- interworking between an ISDN, and
- other ISDNs
- analogue telephony networks
- packet switched data networks

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*) Draft text already provided by Study Group VII.

- circuit switched data networks
- mobile systems

etc.

Comparative Hearing
Cross Interest
Diversification of Control
Ownership and Management, Integration of

Review Board affirms Initial Decision, grants television application where only preference awarded winning applicant was for superior integration. No diversification preference awarded for insignificant cross interests, and Board will not create novel comparative preference for "community organizations."
–*Pittsfield Community TV Assn.*
BC Docket No. 82–420

FCC 83R–61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PITTSFIELD COMMUNITY TELEVISION ASSOCIATION Pittsfield, Massachusetts	BC Docket No. 82–420 File No. BPCT-811217KF
HOUSATONIC BROADCASTING CO., INC. Pittsfield, Massachusetts	BC Docket No. 82–421 File No. BPCT-811217KG
For a Construction Permit for a New Television Station	

Appearances

Howard M. Liberman on behalf of Pittsfield Community Television Association; and *B. Jay Baraff, Aaron Shainis*, and *Lee J. Peltzman* on behalf of Housatonic Broadcasting Co., Inc.

DECISION

(Adopted: August 24, 1983; Released: August 31, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. In this comparative case, after a trial type hearing, Administrative Law Judge Kuhlmann granted the application of Housatonic Broadcasting Co., Inc. for a new television broadcast station in Pittsfield, Massachusetts. Initial Decision, FCC 83D-15, released February 28, 1983. Housatonic was preferred because of the superi-

ority of its quantitative and qualitative participation of ownership in management. Exceptions have been filed by Pittsfield Community Television Association and oral argument was heard June 9, 1983. Upon review of the record and briefs, we affirm the Initial Decision, which correctly applied standard comparative principles to this case.[1]

2. *Diversification of Control.* No other media interests were attributed to either Housatonic or Pittsfield and thus the ALJ found them to be equal for diversification purposes. *I.D.*, paras. 4–21. Pittsfield now argues that it should have been given a moderate preference because of other media interests held by three of Housatonic's principals. Specifically, it states that William K. McDaniel, a 9.1% Housatonic stockholder, is a vice president and account supervisor of a New York City advertising agency, with responsibility for television advertising planning; that Gary Krakow, also a 9.1% stockholder, is the producer of "Early Today," an NBC daily television program; and that Pamela Peterson, another stockholder, owns "a fraction of one percent" of CBS, Inc.

3. We agree with the ALJ that these interests do not warrant the award of any preference to Pittsfield. With regard to Mr. McDaniel, we note that Pittsfield is relying on precedents which indicate that ownership of a local advertising agency, while not ownership of another medium of mass communications, could result in a minor diversification demerit because of the possibility of a potential conflict of interest. *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1499 (Rev. Bd. 1979); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 10 (Rev. Bd. 1973). Here, however, Mr. McDaniel has no ownership interest in the agency in question, which is non-local, and there is no evidence that it places advertising on stations in the Pittsfield area or market. Moreover, Mr. McDaniel has only a comparatively small ownership share in Housatonic. For these reasons, and even accepting, *arguendo*, Pittsfield's contention that Mr. McDaniel occupies a significant managerial position at the New York advertising agency, we conclude that the underlying potential for media concentration or serious conflict, which is the rationale for recognition of this interest, is absent, and that, therefore, no preference is called for. Moreover, *Eastern Broadcasting Corp.*, 30 FCC 2d 745 (Rev. Bd. 1971), cited by Pittsfield for the first time at oral argument, is also distinguishable. There, a cross-interest issue was added based on a specific showing that the applicant owned an advertising agency which served clients in the proposed community of license and placed advertising on at least two of that community's stations.

4. As for Mr. Krakow's role as producer of a network program, we have held only that ownership of a local production company may

[1] A third application filed by Berkshire Television Inc., was dismissed pursuant to a settlement agreement. FCC 83R-30, released April 21, 1983.

bear upon diversification where such ownership is found to undermine the objectives of the Commission's diversification policy in a given case. *Golden State Broadcasting Corp.*, 54 RR 2d 349, 351 (Rev. Bd. 1983), *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723–4 (Rev. Bd. 1981), *review denied* FCC 83–31, released January 25, 1983. Here, however, Mr. Kraskow does not own or control a production company, does not occupy a significant managerial position at NBC where he only produces a single program, and Krakow has only a minority stock ownership in Housatonic. We do not perceive any resulting impairment of the Commission's diversification policies, and Pittsfield has demonstrated none. *Id.* Finally, Ms. Peterson's ownership of less than one percent of the stock of CBS, Inc. is too minimal to have any meaningful impact on diversification of control of the mass media. *See Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982). In sum, we affirm the ALJ's conclusion that neither applicant is entitled to a diversification preference.

5. Participation of Ownership in Management. Housatonic received 41% full-time participation credit and 18.2% part-time credit. Its full-time proposal was enhanced by local residence, broadcast experience, and female participation. By contrast, the ALJ credited Pittsfield with no full-time integration and 12.5% part-time integration. *I.D.*, paras. 22, 29. In its exceptions, Pittsfield argues that the ALJ mistakenly failed to credit its part-time proposal with enhancement for local residence, that he should have awarded only very slight credit to Housatonic for the part-time integration proposal of two of its principals because they would not be at the station on a daily basis but only on weekends, and that Housatonic is therefore only entitled to a moderate preference. Housatonic replies that it is entitled to a substantial preference.

6. We find that Housatonic is entitled to a moderate preference. Even after awarding Pittsfield the overlooked enhancement credit for the local residence of its part-time integrated principal, and agreeing that the part-time proposal of two of Housatonic's stockholders to work on the weekends is entitled to only slight credit, *see Greater Wichita Telecasting, Inc., supra*, 90 FCC 2d at 1051 and n. 6, we conclude that these part-time proposals (18.2% vs. 12.5%) are essentially offsetting and not decisionally significant. The factor of substantial importance here is that of proposed full-time participation by owners in station operations. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). In this regard, the ALJ quite correctly held that Housatonic's 41% full-time proposal manifestly outweighed Pittsfield's 0% proposal. Despite this 41% differential, however, we will award Housatonic a moderate rather than a substantial preference in keeping with our precedent that integration proposals are not entitled to maximum credit where less than a majority of stock ownership is fully

integrated. *See Ottumwa Broadcasting Co.*, 52 RR 2d 1447 (Rev. Bd. 1982); *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982); and cases cited therein, *review denied*, FCC 83–320, released July 7, 1983. *Horne Industries, Inc.* FCC 83R-49, released July 13, 1983 at note 44.

7. *Other Matters.* Pittsfield argues that it should receive a preference because of its status as a non-profit community association which consists of local residents who were "organized to apply for and construct the station and represent the community." Pittsfield Br. at 13. In this regard, Pittsfield relies on the Omnibus Reconciliation Act of 1981 (Public Law 97–35), which amended Section 309 of the Communications Act to authorize the Commission to employ a lottery in initial licensing cases, and the *Notice, Random Selection/Lottery Systems*, 88 FCC 2d 476, 485 (1981), where the Commission recognized the Congressional intent to include community organizations as among the "underrepresented" groups to be given preferences. Finally, Pittsfield contends that it should have received a preference for proposed auxilliary power at its transmitter site and main studio.

8. These exception are denied. First, we cannot accept Pittsfield's position that its status as a "community organization" entitled it to a special preference. Our past cases have declined to create new comparative categories on the basis of novel arguments. *See, e.g., Joseph Bahr*, 92 FCC 2d 114, 122–3 (Rev. Bd. 1982), *affirmed as modified*, FCC 83–321, released July 8, 1983 (no credit awarded applicant claiming to have existing organization, non-profit status, and history of working for minority employment in broadcasting); and *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 955 (Rev. Bd. 1982) (no enhancement credit awarded to applicant on the basis of principal's physical handicap). We adhere to this approach. Pittsfield has established no nexus between its organizational status and the furtherance of the Commission's objectives of diversification of control and best practicable service to the public, and for us to carve out a new comparative niche to accommodate this claim would be to engage in policy-making contrary to our limited function. *Id.* Moreover. as Pittsfield itself acknowledges, the Commission never implemented the lottery procedure it refers to. *See, Report Random Selection/Lottery Systems*, 89 FCC 2d 257 (1982). Indeed, Congress subsequently enacted a new law, which the Commission is now in the process of implementing, that does not contemplate that "community organizations" will receive preferences. *See* Public Law 97–259, enacted September 13, 1982; *see also Las Misionies De Bajar Television Co.*, 53 RR 2d 119, 122 (Rev. Bd. 1983) (lottery legislation "did not deal with or change existing comparative standards and policy.") Finally, we will deny Pittsfield's claim for an auxiliary power preference because it ignores the ALJ's finding, which it does not dispute, that its proposal was made after the pre-designation cut-

off date and therefore constitutes an impermissible comparative upgrading for which credit may not be awarded. *See Webster-Baker Broadcasting Co., supra*, 88 FCC 2d at 949.

9. *Summation.* The only preference awarded in this case is to Housatonic for its superior integration proposal. Neither applicant has received a diversification preference, Pittsfield's claim for credit for a new comparative factor has been rejected, as has its upgraded proposal for auxiliary power which, even if permitted, would only have resulted in a very slight preference and would not have been comparable to the moderate preference awarded Housatonic under the substantially more important comparative factor of integration. Housatonic is the clear comparative choice and a grant of its application will serve the public interest, convenience and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the application of Housatonic Broadcasting Co., Inc. (File No. BPCT-811217KG) for a construction permit for a new commercial television broadcast station to operate on channel 51 at Pittsfield, Massachusetts IS GRANTED, and the application of Pittsfield Community Television Association (File No. BPCT 811217KF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BERKSHIRE TELEVISION, INC. Pittsfield, Massachusetts	BC Docket No. 82–419 File No. BPCT-811026KG
PITTSFIELD COMMUNITY TELEVISION ASSOCIATION Pittsfield, Massachusetts	BC Docket No. 82–420 File No. BPCT-811217KF
HOUSATONIC BROADCASTING CO., INC. Pittsfield, Massachusetts	BC Docket No. 82–421 File No. BPCT-811217KG
For a Construction Permit for a New Television Station	

Appearances

Martin E. Firestone and *Beverly D. Horn* on behalf of Berkshire Television, Inc.; *Howard M. Liberman* on behalf of Pittsfield Community Television Association; and *B. Jay Baraff* and *Aaron Shainis* on behalf of Housatonic Broadcasting Co., Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: February 18, 1983 Released: February 28, 1983)

1. The Chief, Broadcast Bureau designated these applications for comparative hearing on July 9, 1982, *Memorandum Opinion and Order*, 47 Fed. Reg. 32784 (July 29, 1982). The applicants are applying for a television construction permit for a new commercial facility to operate on Channel 51 at Pittsfield, Massachusetts. The following issues are considered in this decision:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. A prehearing conference was held on September 22, 1982. A hearing session was held on December 7, 1982 where written testimony was received into evidence. There was no cross-examina-

tion and the record was closed on the day of the hearing. *Order*, FCC 82M-3912, released December 9, 1982. Proposed findings and conclusions of law were filed by the three applicants on December 30, 1982 and replies were filed on January 14, 1983.

Findings of Fact

3. *Diversification*: *Berkshire Television, Inc.* has no mass media ownership but its Secretary, Martin E. Firestone, who owns 42.5 percent of Berkshire's stock, owns 25 percent of Multi Media Communications Corporation. Berkshire Exh. 4. Multi Media owns 89 percent of JEM Communications, Inc., permittee of WSJN-TV, Channel 24, San Juan, Puerto Rico and 100 percent of Vinco Communications Corp., which holds 6 percent of the Class B, nonvoting stock in Hess Broadcasting Corporation, permittee of Channel 15, Mobile, Alabama. *Id.* Mr. Firestone is also a less than 1 percent stockholder of Springfield Television Corporation, which is the licensee of television stations in Springfield, Massachusetts and Dayton, Ohio. In addition, Springfield Television is the parent of Springfield Television of Utah, which is the licensee of KSTU, Salt Lake City, Utah.[1] *Id.* Jean Kaddy and Raymond Goudreau, Berkshire principals, currently work for Springfield Television but they intend to resign if a grant is made to Berkshire. *Id.*

4. *Pittsfield Community Television Association* did not indicate whether it has interests in mass media. PCTA Exh. 1. However, it did state that three members of the association, Maurice E. Callahan, Jr., Robert Petricca, and Steven B. Schwartz have media or media related interests. *Id.* Mr. Callahan is president of an outdoor advertising business in Pittsfield, Maurice Callahan & Sons, Inc. Mr. Petricca is a principal in a long distance resale carrier, Petricca Industries. And Mr. Schwartz owns a media production agency and audio recording studio in Pittsfield. *Id. Housatonic Broadcasting Company, Inc.* has no media interests and neither does its stockholders. Housatonic Exh. 1, at 2.

5. *Integration of Ownership into Management*: *Berkshire Television* proposes to integrate two stockholders, Jean Ellen Kaddy and Raymond Goudreau. Berkshire Exh. 1, Table 1. Ms. Kaddy, who is a Director, President and Treasurer of Berkshire and holds 42.5 percent of its shares, proposes to work full time at the station. Berkshire Exh. 1, at Table 1; Exh. 2, at 1–2. While her testimony states that she will participate in management, there is no indication how this will be carried out. *Id.* Currently, Ms. Kaddy works in Springfield, Massachusetts. (The record does not reflect where she lives.) Since 1970 she has worked as an administrative assistant at

[1] John A. Fergie owns as much of Multi Media and Springfield Television as Mr. Firestone. *Id.* He is the father of Jean Kaddy, who is President, Treasurer and a 42.5 percent stockholder of Berkshire Television.

WWLP in Springfield, which is licensed to Springfield Television Corporation. Berkshire Exh. 2, at 1. At WWLP she dispatches news, schedules traffic and programs, and apparently conducts public relations.[2] *Id.* Ms. Kaddy has not stated that she will move to Pittsfield.

6. Mr. Goudreau, who is a Director and 5 percent owner of Berkshire, proposes to work full time as Chief of Engineering. Berkshire Exh. 3, at 2. Mr. Goudreau also works for the stations owned by Springfield Television, where, since 1977, he has been Assistant Director of Engineering. *Id.* Before that, and since 1964, he has been a staff engineer at various stations. *Id.* The record does not reflect where Mr. Goudreau lives, nor has he indicated whether he would live in Pittsfield.

7. *Pittsfield Community Television Association*, which is a non-profit community association, proposes that three of the association's members would participate in the operation of the station. Steven B. Schwartz proposes to act as the station's full-time general manager and Edmund B. Grosso and Scott C. Taylor, Sr. would spend 20 hours per week as "Technical Advisory Managers." PCTA Exh. 2. Pittsfield Community Television Association has 18 members. PCTA Exh. 4, at Attachment A. It proposes that these members will take an interest in the station operation by giving advice, participating in program planning and other pursuits of the organization. PCTA Exh. 2, at 1. However, Messrs. Grosso and Schwartz were only made members of the association after designation and shortly before the hearing.[3]

8. The Petition for Leave to Amend filed November 26, 1982 by Pittsfield Community Television notified the Commission that one director, George Crane, had resigned on October 4, 1982 and that on that same day eleven new membership applications had been accepted.[4] Preceding the October 4, 1982 meeting Pittsfield Community Television had eight director-members, seven of whom were Board members and were listed in the application when it was filed and one, John S. Clark, who had become a director-member

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[2] Ms. Kaddy asserts that there is merit to the fact that she has "longstanding ties to the Western Massachusetts area." The policy in comparative hearings, however, attaches credit primarily to civic participation and local residence in the principal community and secondarily to residence within the service area. While the community encompasses an area which includes at least the primary service area of the proposed station, there is no evidence that the Commission recognizes unspecified "ties" to a section of a state. The record does not reflect whether Ms. Kaddy lives within Berkshire's proposed service area.

[3] Messrs. Grosso and Schwartz were accepted as members of Pittsfield Community Television on October 4, 1982, and then 53 days later—three days before the written case was due on November 29, 1982—Pittsfield Community Television petitioned to amend to reflect their membership.

[4] The new members were John A. Barry, Jr., Isadore Goodman, Steven Schwartz, Gordon Reynolds, Robert Petricca, Edward Grosso, Jr., Maurice Callahan, Susan Francese, Beverly Mancivalano-Schwartz, Pat Donovan, and Michael Casey.

sometime after the and one, John S. Clark, who became a director-member sometime after the application was filed.[5] Affidavit of Pittsfield's President, William H. McAlister, Jr., attached to Opposition to Motion to Enlarge Issues, filed September 13, 1982 by Pittsfield Community Television Association.[6]

9. Pittsfield Community's November 26, 1982 amendment changes the control of the association only insofar as it alters the Board of Directors, because, as Pittsfield Community's bylaws state, "affairs of the Association shall be governed by a Board of Directors composed of seven persons . . .." PCTA Exh. 6, at Bylaws Article IV, Section 1. The Board of Directors "shall have the powers and duties necessary for the administration of the affairs of the association . . .." *Id.*, at Section 2.

10. Pittsfield Community Television explained "that control of the association's affairs is vested in the board of directors." Opposition to Motion to Enlarge Issues, filed September 13, 1982 by Pittsfield Community Television Association, at 3. "[T]he affairs of the association are managed by [the] seven member board of directors." *Id.*[7] The members of the Board are Robert K. George, William H. McAlister, David J. Tierney, Scott C. Taylor, Andrew Campoli, Eugene Dellea, and John S. Clark. PCTA Exh. 7.

11. Of the three persons proposed for participation for a specific time at the station, only Scott Taylor is a member of the Board of Directors. PCTA Exh. 2. Mr. Taylor proposes to spend 20 hours per week as one of two Technical Advisory Managers. *Id.* He lives in Pittsfield where he is President of Taylor'd Sound, Inc. PCTA Exh. 3, at 1; PCTA Exh. 4, at 4.

12. *Housatonic Broadcasting* proposes that stockholders Gary M. Kaye, Gary S. Krakow, Pamela W. Peterson, Jonathan M. Heller, Ronald Richman and William K. McDaniel would be integrated. Housatonic Exh. 1, at 2–3.

13. Mr. Kaye, who is President, a Director, and an 11.4 percent stockholder of Housatonic, proposes to work as the full-time General Manager and Executive Producer. Housatonic Exh. 1, at 2. Housa-

[5] An amendment was filed notifying the Commission about Mr. Clark's membership on February 9, 1982. The final date for submitting amendments in response to the January 7, 1982 "B" cut-off was February 10, 1982.

[6] Reference is made to the above pleading in Pittsfield's November 26, 1982 amendment adding 11 new members.

[7] Those persons who are only members of the Pittsfield Community Television Association meet annually to elect members of the Board of Directors and transact business. PCTA Exh. 6, at Article III, Section 2. However, a petition presented by 20 percent of the membership for a specific purpose requires a meeting of the membership. PCTA Exh. 6, at Article III, Section 3. Pittsfield Community Television also asserts, without reference to the bylaws, that a certificate of membership represents beneficial ownership in the Association and that it establishes "a right of participation in the program planning and other pursuits of the Association." PCTA Exh. 3, at 1 and Attachment B.

tonic Exh. 2, at 1. He would direct the overall station operation and he would be responsible for the programming content of the station. Housatonic Exh. 2, at 1–2. Since 1966 he has been employed at radio and television stations, and broadcast networks. *Id.*, at 3–4. He has worked as a news writer, announcer, reporter, editor and producer, a public affairs producer, television assignment editor for NBC News, and producer of NBC Radio News' coverage of the Republican National Convention in Detroit. *Id.* Mr. Kaye would move his full-time residence to Pittsfield if a grant is made. *Id.*, at 2.

14. Pamela W. Peterson, who is Treasurer, Director, and an 11.4 percent stockholder of Housatonic, proposes to work full time as the Chief Engineer. Housatonic Exh. 3, at 1. She would direct the day-to-day technical operation of the station and would be responsible for fiscal matters for the corporation. *Id.*, at 1,2. She is licensed as a First Class Radio Telephone Operator. *Id.*, at 2. Currently, she is manager of Long Term Planning, Technical Facilities, for the CBS Broadcast Center. *Id.*, at 4. Since 1967 she has worked at radio and television stations in technical, programming, and sales positions. *Id.*, at 3, 4, 5. She would move to Pittsfield if Housatonic's application is granted. *Id.*, at 2.

15. Jonathan M. Heller, a Director and 9.1 percent stockholder of Housatonic, proposes to work full time as Station Manager and Sales Manager. Housatonic Exh. 1, at 1, 2; Exh. 5, at 1. Mr. Heller would direct the business operations of the station. Housatonic Exh. 5, at 1. He would be responsible for the operations of the sales department, promotion, and business administration. *Id.*, at 2. All department heads other than programming and engineering would report to him. *Id.* Mr. Heller has worked in radio and television broadcasting since 1968. *Id.* He has been an announcer, traffic coordinator, and cameraman. *Id.* Mr. Heller would move to Pittsfield. *Id.*

16. Ronald Richman, who is a Director and 9.1 percent stockholder of Housatonic, proposes to work full time as Operations Director. Housatonic Exh. 1, at 2, 3. In this position, Mr. Richman would direct production of commercials and news. Housatonic Exh. 4, at 1. Mr. Richman has worked as a free-lance video technician for Broadcast News Service; he is the production supervisor for a cable television talk show; and he does free-lance production work for commercial and documentary film or video. *Id.*, at 2–3. He would move to Pittsfield. *Id.*, at 2.

17. Gary S. Krakow, who is Vice President, Director, and a 9.1 percent stockholder, proposes to work part time (20 hours per week) as News Manager of the proposed facility. Housatonic Exh. 1, at 2. Mr. Krakow would work on weekends and direct the news operations of the station. Housatonic Exh. 6, at 1–2. He works as the producer of NBC's early morning news program, Early Today. *Id.*, at 2–3. Mr.

Krakow has extensive broadcast news experience. *Id.* Mr. Krakow lives in New York City and would not move to Pittsfield. *Id.*

18. William K. McDaniel, who is Secretary, a Director and a 9.1 percent stockholder, proposes to work part time (20 hours per week), on weekends, as Promotion Manager of the proposed facility. Housatonic Exh. 1, at 3; Exh. 7, at 1. He would have full charge of the station's promotional activities. Housatonic Exh. 7, at 1. Mr. McDaniel is and has been an account supervisor for New York City advertising agencies where he has been and is responsible for media planning for national and local television advertising. *Id.* He lives in Rye, New York and would not move to Pittsfield. *Id.*

Conclusions of Law

19. *Diversification of Control of the Medium of Mass Communications*: Berkshire Television, Inc. has no mass media interests, but Martin Firestone, who is a Director, Secretary, and Berkshire's largest stockholder (42.5 percent, individually, and his wife, Elaine B. Firestone, holds an additional 10 percent), holds a 25 percent interest in Multi Media Communications Corporation. Multi Media owns 89 percent of JEM Communications, the permittee of WSJN-TV, Channel 24, San Juan, Puerto Rico, and 100 percent of Vinco Communications Corp., which holds a construction permit for Channel 15, Mobile, Alabama. Mr. Firestone also holds less than 1 percent of Springfield Television, which is the licensee of a number of television facilities. Housatonic Broadcasting and its stockholders have no cognizable mass media interests. Pittsfield Community Television Association did not state whether it holds other media interests. It did list the outdoor advertising interest of Maurice Callahan, one of its 18 association members, the long distance telephone resale business of Robert Petricca, another member, and the audio recording studio and media production agency of Steven Schwartz, also an association member.

20. Housatonic Broadcasting and Pittsfield Community Television Association are to be slightly preferred over Berkshire on the diversification criteria because of Martin Firestone's interest in the San Juan, Puerto Rico and Mobile, Alabama television facilities. Berkshire receives a very slight demerit for his interests. A slight demerit is assessed because the facilities are some distance from Pittsfield. Nevertheless, a demerit is warranted because it cannot be concluded that Mr. Firestone has no influence, or control, over the Puerto Rican facility since Berkshire has not indicated the importance of Mr. Firestone's holdings in terms of the other stockholders.

21. Pittsfield Community Television stands in the same position as Housatonic and it, too, is to be preferred over Berkshire because its Board of Directors does not have any mass media interests. The interest of Messrs. Petricca and Schwartz would not be cognizable for assigning a diversification demerit under any circumstances. *Mid-*

west Broadcasting Company, 70 F.C.C. 2d 1489, 1498–99 (Rev. Bd. 1979). However, the interest of Mr. Callahan in local outdoor advertising might be considered because of its potential for affecting the economic control of mass media if he held any control of the Pittsfield Community Television Association. But, Mr. Callahan is only one of 18 members of Pittsfield Community Television Association and he is not a member of its Board of Directors where "control of the association's affairs is vested . . .."

22. *Full-time Participation in Station Operation by Owners*: Housatonic and Berkshire are to be preferred over Pittsfield Community Television on this criteria, and Housatonic is to be preferred over Berkshire for the following reasons: Housatonic's Gary M. Kaye, an 11.4 percent stockholder, Pamela W. Peterson, an 11.4 percent stockholder, Jonathan M. Heller, a 9.1 percent stockholder, and Ronald Richman, a 9.1 percent stockholder, propose to work full time in management positions at the station and they propose to live in Pittsfield. Each of them has experience in the television field, each holds a position of significance in the Housatonic corporation, and Ms. Peterson enhances the proposal because she is a woman. In addition, Gary Krakow, a 9.1 percent stockholder, and William K. McDaniel, also a 9.1 percent stockholder, would occupy management positions on a part-time basis and have had experience performing the jobs they would occupy. They would, however, work only on weekends and would not live in Pittsfield. Nevertheless, their participation means that 59.2 percent of the ownership of Housatonic would participate in the management of the station.

23. While Berkshire promises slightly more full-time participation by owners (47.5 percent compared to Housatonic's 41 percent), the part-time participation of two Housatonic stockholders who own 18.2 percent of its stock outweighs the slightly greater full-time proposal of Berkshire. Furthermore, Berkshire's full-time intergration proposal is vague about the responsibilities that would be handled by Jean Kaddy. Ms. Kaddy, who holds 42.5 percent of Berkshire's stock and is a coporate officer, "propose[s] integration into the management" of the station. Berkshire Exh. 2, at 1. Nowhere does Berkshire explain what it is that she would do at the station.

24. The *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965) requires that before full credit is given for an integration proposal, an assessment must be made of the policy functions the person would undertake and the likelihood that the person would play an important role in management. For example, the Commission has stated that it would accord significant weight to certain staff positions held by owners. *Id.* And "although positions of less responsibility will be considered . . . they cannot be given the decisional significance attributed to the integration of stockholders

exercising policy functions." *Id.* Ms. Kaddy can be credited with her promise of full-time participation in management but no assessment can be made that she would undertake a policy role or that her job will be important in the management of the station. Berkshire's proposal to integrate Raymond Goudreau, who is a Director, 5 percent stockholder, and proposed full-time Chief of Engineering, does not suffer from the same infirmity.

25. Qualitatively Housatonic's full-time proposal is also superior to Berkshire's. Berkshire's Kaddy and Goudreau do not live in Pittsfield and they have not stated that they would move there. In contrast, all of Housatonic's stockholders, who propose to work full time, have indicated that they would move to Pittsfield.[8] While both Kaddy and Goudreau have broadcast experience, so do all of the stockholders proposed for integration by Housatonic.

26. Ms. Kaddy, as a 42.5 percent stockholder, receives credit as an integrated woman, but so does Housatonic's Pamela W. Peterson. Neither Ms. Kaddy nor Ms. Peterson hold control of the applicant, and their ownership positions are relatively the same, since no other stockholder in either applicant owns a greater number of shares than they do.[9] (That is the case for Berkshire unless the 42.5 percent held by Berkshire's Martin Firestone is combined with his wife's shares.) However, Ms. Peterson's role in the policy formation and management of Housatonic is clearly defined and important and, therefore, the import of her female credit can be assessed. Overall on qualitative grounds Housatonic is entitled to a moderate preference over Berkshire because its stockholders proposed for full-time integration will move to Pittsfield and because Housatonic has given a well defined and important role to a woman who owns a significant share of the applicant.

27. Pittsfield Community Television Association proposes that three members of the association would work at the station, Steven Schwartz, Edmund B. Grosso, and Scott C. Taylor. Steven Schwartz, who would work full time, and Edmund B. Grosso, who would work

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[8] Berkshire states that "Mrs. Kaddy's long-standing ties to the Western Massachusetts area, with concomitant personal knowledge of area issues and problems, will also be valuable . . .." Berkshire Exh. 2, at 1–2. With regard to Mr. Goudreau, the testimony indicates that "his extensive ties to the Western Massachusetts area . . . indicate that he will be sensitive to the needs of the local area." Berkshire Exh. 3, at 2. The only example of sensitivity cited was the fact that Mr. Goudreau has been married for twenty-one years and has three children. *Id.* The Commission provides primary credit to residence in the community and a lesser credit to residence in the service area. *Waters Broadcasting Corporation*, 52 Radio Reg. (P&F) 2d 1063, 1065–66 (1982). But Berkshire's statements are too imprecise to credit: Berkshire does not claim that Kaddy and Goudreau live in the community of Pittsfield, or in the service area. They only refer to unspecified "ties" and an unexplained familiarity with Western Massachusetts.

[9] Cf. *Gilbert Broadcasting Corp.*, 52 Radio Reg. (P&F) 2d 429, 444 (1982) (where the Commission gave a greater preference to minority control).

part time, became members of the association on October 4, 1982. Scott C. Taylor, Sr., who would work part time, was a member of the association and its Board of Directors at the time the application was filed.

28. Whether any or all of these people should receive credit for their participation largely depends on their authority or ability to exercise control over the operation of the nonprofit Association. Pittsfield Community Television Association's seven person Board of Directors has the power and duty to administer the Association. The Board holds control and manages the Association's affairs. Members of the Association elect Board members and, in the ordinary course, have the right to vote on matters at an annual meeting. While Pittsfield Community Television Association claims in its Exhibit 3 that a member has a beneficial ownership and a right to participate, it is clear from its bylaws and earlier filings in this proceeding that the right is limited and that control of the Association's affairs on a day-to-day basis rests with the Board of Directors. The bylaws state that the Board of Directors will be made up of seven members, although until just before the hearing there were eight directors. Assuming authority rests with the Board, then any integrated Board member would receive 14.3 percent credit if there were seven members.

29. At the cut-off date Pittsfield Community Television Association's authority was distributed among the eight members of the Board of Directors. Now it proposes that one of its directors, Scott Taylor, would work part time at the station. At the cut-off date he held 12.5 percent of the Association's control. His part-time promise is insignificant when compared to Housatonic and Berkshire's applications.

30. Until October 4, 1982, Pittsfield Community Television Association had no members who were not also directors but then on that date it accepted eleven members who are not directors. It seeks integration credit for two of these new members who are not directors.

31. The other applicants oppose giving credit to these new members because they were added to the application after the "B" cut-off date—the date on which the applications could no longer be amended as a matter of right. Pittsfield Community Television's response to this argument is that it told the Commission when it filed that it might add new members and therefore it has the right to do so. Pittsfield Community Television offers no support for its assertion and there is none. Applicants cannot improve their comparative standing after the cut-off date by adding new owners who promise to integrate. See *Birmingham Family Television, Inc.*, 52 Radio Reg. (P&F) 2d 525, 526, 528 (Rev. Bd. 1982). Although Pittsfield Community Television may add new members who would manage the station, their promise is not of comparative importance

because it does not couple legal control with management since they are not directors. Adding members, therefore, does not improve Pittsfield Community Television's position.[10]

32. Pittsfield Community Television Association also seeks comparative credit for proposing auxiliary power. Housatonic points out, however, that Pittsfield's application contains no such proposal and to permit an amendment would be to allow Pittsfield to improve its application after the "B" cut-off date. In any event, the *Addendum to the Policy Statement*, 2 F.C.C. 2d 667 (1966) provides that auxiliary power is a factor only in AM and FM broadcast proceedings; therefore, no preference is warranted.

33. In sum, Housatonic is to be favored because its quantitative and qualitative integration proposal is better than Berkshire's, and superior to Pittsfield Community Television Association's. In addition, Housatonic's comparative standing on diversification is slightly better than Berkshire's. Berkshire's integration would be quantitatively better than Pittsfield Community Television Association's. Pittsfield Community Television is better on diversification than Berkshire, but this difference does not outweigh Berkshire's superior integration proposal.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed November 26, 1982 by Pittsfield Community Television Association IS GRANTED and the amendment IS ACCEPTED, subject to the condition that the changes effectuated in its membership and Board of Directors will not improve its comparative position.

IT IS FURTHER ORDERED that the applications of Berkshire Television, Inc. (File No. BPCT-811026KG) and Pittsfield Community Television Association (File No. BPCT-811217KF) ARE DENIED and the application of Housatonic Broadcasting Company, Inc. (File No. BPCT-811217KG) for a construction permit for a new commercial television station to operate on Channel 51 at Pittsfield, Massachusetts IS GRANTED.[11]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN, *Administrative Law Judge*

[10] If the control of Pittsfield Community Television does rest with its members, then the November 26, 1982 amendment notifying the Commission of the change presents an even more serious question of whether control had transferred. See *Pacifica Foundation*, 36 F.C.C. 147, 152 (1964) (where an existing non-profit licensee was expected to, and did, apply for a transfer of control of even a non-commercial facility).

[11] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Application, Acceptance of

Petition for review of Bureau's action returning application denied. Since the applicant's proposed service area already receives the signals from two full-service stations, the applicant's provision of a first local service does not meet the Commission's freeze exemption criteria for new proposals and the application is therefore dismissed.
–P.M. B/cing Co., Inc.

FCC 83–362

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

P.M. BROADCASTING COMPANY, INC.

For Construction Permit For a New Low Power Television Station in Portsmouth, New Hampshire

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1983 Released: August 3, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration a petition filed by P.M. Broadcasting Company, Inc. (PM), for review of the Mass Media Bureau's return of the above-captioned application on August 4, 1981. The application was returned because it was filed after the imposition of the Commission's freeze on the acceptance of new low power television applications and failed to meet any of the exemptions to that freeze.

2. By way of background, on April 9, 1981, with insufficient staff and computer capability to handle the approximately 5,000 TV translator and low power television applications already on file, the Commission stopped accepting new applications. However, exceptions were made for: existing translators operating on Channels 70 through 83 seeking to change frequency to a lower channel; existing translators seeking to change channels to eliminate interference to full-service stations; or new proposals to serve areas receiving fewer than two full-service stations. *Order Imposing Freeze*, 46 Fed. Reg. 26062, published May 11, 1981, 49 RR 2d 433. In its *Report and Order* in BC Docket No. 78–253, 49 Fed. Reg. 21468, published May 18, 1982, 51 RR 2d 477, establishing a low power television service, the Commission did not lift the freeze, but did eliminate the freeze

exemption for proposals to serve areas currently receiving fewer than two full-service stations. Instead, applications were grouped into categories by market size. Those applicants proposing to locate their transmitting antennas more than 55 miles from the coordinates of any of the top 212 television markets are placed in Tier I and are now freeze exempt. Applicants other than those in Tier I are grouped in Tiers II and III by market size. Under the tiered system, processing of the first tier must be completed before processing of the second tier begins, and so on. The freeze will be lifted only for the limited purpose of receiving competing applications to the applications published on cut-off lists.

3. In its application for review, PM acknowledges that its proposed community of license, Portsmouth, New Hampshire, already receives coverage from two full-service television stations. One station is licensed to Boston, Massachusetts, and the other to Portland, Maine. In addition, PM notes that Portland, Maine, the 79th largest television market,[1] is located approximately fifty miles from Portsmouth. Nevertheless, PM contends that its application falls within one of the exceptions to the freeze order because PM's proposal would bring the first local television service to Portsmouth. According to PM's reasoning, the provision of first local service is equivalent to a proposal to cover areas that directly receive fewer than two full-service television stations.

4. We are unable to accept PM's contention that its application is freeze exempt. In adopting the freeze exemption for areas receiving fewer than two full-service television stations, we noted that the exemption encompassed two of the five service priorities listed in the *Sixth Report and Order* in Docket Nos. 8736 and 8975, 9174 and 8976, 41 FCC 148, 167 (1952):

> (1) To provide at least one TV service to all parts of the United States and
>
> (2) To provide a choice of at least two TV services to all parts of the United States

Moreover, we stated that it was "our opinion that, in the context of TV translator and low power stations, these two service priorities of the Sixth Report and Order are of paramount importance because they would facilitate service to areas most in need of it, the primary goal of our interim policy." In establishing that freeze exemption, we declined to include the other service priorities specified in the *Sixth Report and Order*; such as, the priority for the provision of at least one television station for each community. In our opinion, the inclusion of that latter service priority would have nullified the purpose of the freeze since we anticipate that, in light of the small and undefined coverage areas of low power stations, many applicants

[1] Public Notice encaptioned "Television Channel Utilization", FCC mimeo number 3331, dated April 16, 1982.

could claim that they were providing the first local service to their area of license.

5. The reason for imposing our April, 1981 freeze on the acceptance of low power applications was to establish an orderly and effective procedure for the processing of the unanticipated large volume of applications. Since that time, we estimate that an additional 7,000 applications have been filed under our existing freeze exemptions. In view of the steady influx of Tier I low power applications and the commensurate burdens imposed on our staff, we believe it is in the public interest to continue to maintain a freeze on the acceptance of low power applications.

6. Here, we find that PM's application fails to meet any of the freeze exemptions specified in our April 1981 *Order Imposing Freeze* since the applicant proposes to serve an area that presently receives two full-service stations. Moreover, the application may not be accepted under our present Tier I freeze exemption since PM proposes to locate its station less than 55 miles from a television market. Finally, in view of the considerable number of pending applications, we believe that PM's provision of a first local service does not justify the requested waiver or a lifting of the Commission's freeze on the filing of low power television applications. We simply will not be able to establish the new low power television service in an efficient, orderly manner if waivers are readily granted. Under these circumstances, we find that the Bureau's dismissal of the P.M. Broadcasting Company, Inc. application was proper and we hereby affirm that action.

7. Accordingly, IT IS ORDERED that the request for waiver of the Commission's *Order Imposing Freeze* filed by P.M. Broadcasting Company, Inc., IS DENIED.

8. IT IS FURTHER ORDERED that its petition for review of the Mass Media Bureau's action returning its application IS DENIED.

9. IT IS FURTHER ORDERED that the Mass Media Bureau send a copy of this Memorandum Opinion and Order by Certified Mail - Return Receipt Requested to the party named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Rate or Tariff Unlawful
Satellite Domestic Communications
Tariff, Suspension

On remand from the Court of Appeals for the District of Columbia Circuit, the Commission explains further its decision that RCA's tariff revisions for its Domestic Satellite Services are unjust and unreasonable under Section 201(b) of the Act.
–RCA American Communications, Inc.
CC Docket No. 80–766

FCC 83–370

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
RCA AMERICAN COMMUNICATIONS, INC.	**CC Docket No. 80–766**
Revisions to Tariff FCC Nos. 1 and 2	**Transmittal Nos. 191 and 273**

MEMORANDUM OPINION AND ORDER

(Adopted August 3, 1983; Released August 5, 1983)

BY THE COMMISSION:

1. On July 21, 1982 the D.C. Circuit Court of Appeals remanded the record of the captioned proceeding to the FCC for an unambiguous statement of the rationale for our decision. *RCA American Communications, Inc.* v. *FCC*, Case Nos. 81–1558, et al. (*Judgment* entered July 21, 1982). This order is intended to provide the statement required by the Court.

2. This controversy began in April 1980 when RCA American Communications, Inc. (Americom) filed revisions to its domestic satellite service tariffs. The revisions proposed changes both in the rates and in the terms and conditions on which Americom's satellite services would be offered. They would have raised the rates for Americom's satellite service, changed the length of the service terms, eliminated less expensive grades of service, effectively prohibited customer termination of service and changed the time limits for notice of a customer's intention to renew the service. The general impact of these revisions would have been to alter substantially the conditions under which customers had committed themselves to take service from Americom. See *RCA American Communications, Inc.*, 84 FCC 2d 353, 360–62 (1980).

3. Because we were concerned that the proposed changes might not be reasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. 201(b), we suspended the Americom tariffs for five months pending investigation. *Id.* Although we noted that the tariff filing process presupposes that carriers be permitted to initiate tariff changes, we determined that there were a number of reasons for carefully scrutinizing the Americom proposal. These included the carrier's dominant position in the industry, the sweeping changes it proposed in virtually every significant term and condition of the service, the potential hardship to relying customers, and the possible unfairness to the customer in allowing the carrier to make changes in the middle of the term while binding the customer to all the tariff provisions until its expiration. *Id.* at 356–59. We concluded that, under these circumstances, the reasonableness test of Section 201(b) involved considerations of fairness to carrier and customer alike.

4. After investigation, we declared the proposed revisions unjust and unreasonable in violation of Section 201(b) of the Communications Act. *RCA American Communications, Inc.*, 86 FCC 2d 1197 (1981). Our decision centered in large measure on our conclusion that the reasonableness of a proposal to revise material provisions of a long-term tariff in the middle of its term "must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time." *Id.* at 1201. We determined that "if a carrier can make a showing of substantial cause, its decision to alter tariff terms will be considered reasonable." *Id.* at 1201–02. Applying this test, which has come to be known as the "substantial cause for change" test, to the Americom proposal, we found that the carrier had not established the reasonableness of reducing the length of the service terms, eliminating part-time and one-year service and prohibiting customer termination of service. *Id.* at 1203–06.

5. Americom challenged this finding in the D.C. Circuit Court of Appeals. It argued that the substantial cause test was a separate hurdle that required it to justify changing existing tariff terms in addition to proving reasonableness under 201(b). Relying upon *American Telephone and Telegraph* v. *FCC*, 487 F. 2d 865 (2d Cir. 1973), Americom asserted that such a requirement unlawfully interfered with the carrier's right to initiate and implement new tariffs. Commission counsel, responding to Americom's arguments, explained that the test employed in the FCC's order was not a new barrier to the filing of tariff changes. Rather, the brief said, it was an FCC recognition that, under the circumstances presented in this case, reasonableness was not a function of cost alone, but also of other factors such as customer reliance upon the long term provisions of the existing tariff.

6. In its *Memorandum* accompanying the *Judgment*, the Court

agreed with the FCC that the "reasonableness" determination required under section 201(b) need not be confined to mere consideration of the carrier's costs of providing service. It said:

> reasonableness ultimately depends on the special facts of each case. . . . [w]e see no reason why the Commission, in a thoughtful and properly supported exercise of its expertise, could not decide that substantial customer reliance expenditures have been induced by a particular type of tariff, and that these should play a significant role in defining the zone of reasonableness within which the carrier is free subsequently to modify its rates and practices."

Memorandum, p. 4. Nonetheless, the Court concluded that it was not clear from our order that we had employed the "substantial cause for change" test merely as factor for defining the zone of reasonableness under 201(b). The Court found that some language in the order supported Americom's characterization of the test as an additional hurdle for the carrier to overcome. Thus, the Court remanded the record of this case to the Commission "for an unambiguous statement of its rationale for invalidating [Americom's] revised tariff." *Memorandum* p. 6.

7. In response to the Court's *Judgment*, we take this opportunity to specify that we returned Americom's tariff revisions because we found them unjust and unreasonable under 201(b) of the Communications Act. It is well established that we have broad authority to interpret the Communications Act and determine when a tariff is just and reasonable. See *Nader* v. *FCC*, 520 F. 2d 182, 192 (D.C. Cir. 1975). We used that authority in this instance by employing the substantial cause for change test as a tool for defining the appropriate zone of reasonableness applicable to the Americom tariffs. The circumstances that surrounded the Americom filing clearly indicated that customer fairness was an appropriate factor to be considered under the Section 201 reasonableness test. In particular, the peculiar characteristics of the domestic satellite industry, Americom's position in that industry and the nature of the tariffs and proposed changes before us indicated that customer equity was an important consideration in this case. Accordingly, and for the reasons specified in paragraphs 14–28 of our May 21, 1981 *Order* in this proceeding, we reaffirm our finding that Americom failed to establish the reasonableness of the tariff changes it proposed.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

ISM Equipment
Lighting, Radio Frequency
Lighting, Specifications

Notice of Inquiry adopted seeking information to aid the Commission in formulating regulatory policy for lighting devices using radio frequency (RF) energy. Part 18 Subparts H and E (by reference) currently applies to RF lighting devices. These rules, however, are not considered appropriate for new RF lighting devices.

–RF Lighting Devices
Gen. Docket No. 83–806

FCC 83–360

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
FCC Regulations concerning RF Lighting Devices.	Gen. Docket No. 83–806

NOTICE OF INQUIRY

(Adopted: July 28, 1983 Released: August 5, 1983)

BY THE COMMISSION:

Introduction

1. This Notice of Inquiry is issued to assist the Commission in determining what, if any, minimum regulatory requirements are necessary to minimize the interference potential of radio frequency (RF) lighting devices. In this Inquiry we are seeking information concerning the emission characteristics of RF lighting devices and the degree to which these products may become sources of harmful interference to authorized radio communication services. If a significant potential for interference exists, information submitted in response to this inquiry will aid us in determining what technical standards are necessary to control emissions to a level which would minimize interference.

2. Parallel with our effort in this Inquiry, we encourage the RF lighting industry to study the need for and, if found necessary, adopt voluntary industry standards to minimize the interference potential of their RF lighting devices. The Commission considers that voluntary industry standards would be preferable to government imposed regulations, particularly in an evolving area of technology. An

additional purpose of this Inquiry is to seek information on the ability of the RF lighting industry to regulate the interference potential of their devices.

3. If government regulations are needed, information gained from this Inquiry will be useful to the Commission in developing the minimum regulations necessary for the control of harmful interference from these RF lighting devices. We plan to investigate the least burdensome technical or administrative (i.e. labelling, user information, equipment authorization, etc.) regulations which could accomplish our goal of providing for use of this new technology while adequately protecting radio communication services against undue interference. We should stress at the outset that any regulatory requirement will be viewed as a last alternative to a workable voluntary standard.

RF Lighting Devices

4. RF lighting is an energy efficient lighting system currently being developed. AC power is taken from the power line, converted to RF energy[1] and applied to a fluorescent tube to produce light. Such RF lighting is claimed to be up to 3 to 4 times more energy efficient than incandescent lighting and than conventional fluorescent lighting using electromagnetic ballasts. Although this fact has been known for some time, it is only recently that electronic or RF ballasting has become cost effective. Developments of RF lighting are moving in several directions. One development is in the direction of a self contained lamp to be screwed into the standard incandescent bulb socket. A second development is producing an electronic or solid state ballast to replace the conventional electromagnetic ballast in the standard fluorescent fixture. A third development is looking toward the distribution of RF energy over a dedicated set of wires to the individual fluorescent fixtures. In this Notice of Inquiry we will use the term "RF lighting device" to encompass all the developments enumerated above.

5. The SL-18 RF light bulb developed by North American Phillips Lighting Corporation, is typical of the first development enumerated above. This bulb contains a folded fluorescent tube and has the necessary electronic circuitry built into the glass envelope. The electronic ballast produced by International Energy Conservation System and Soli-Tronics typify the second development described above. The operation of a fluorescent tube with an electronic ballast is similar to that of a tube using a conventional electromagnetic ballast. The difference lies in the internal circuitry. In the electronic ballast the 60 Hz AC line voltage is first rectified to DC.

[1] Most electronic ballasts operate between 20 and 40 kHz. However, the Commission is aware of the development by Litek International Corp. of an electronic ballast for a fluorescent light bulb which operates at 13.56 MHz.

The DC voltage is applied to an inverter whose output is RF energy at a frequency above 20 kHz. The RF energy is then applied to the fluorescent tube through an RF choke[2] to strike an arc which in turn excites the fluorescent coating to emit light. The rectifier, the inverter and the RF choke are all in the same package which looks exactly like the conventional electromagnetic ballast and is installed in the same way by the electrician. In this connection, we are aware that in some commercial and industrial RF lighting systems, instead of using an individual electronic ballast in each fixture, the system uses a centrally located piece of equipment that provides the AC to DC to RF conversion with the RF energy distributed to the individual lighting fixtures over a dedicated set of wires. In other such system, only the rectifier is centrally located with the DC voltage distributed to the individual lighting fixtures, each of which contains a simplified electronic ballast.

6. The General Electric Co. has taken a different path in its development of an RF light bulb—the GE Electronic Halarc light bulb. Unlike the electronic ballasts for fluorescent tubes where RF energy is used continuously while the bulb is on, the GE bulb uses RF energy only for a few seconds in the initial start-up mechanism of the bulb. GE intends for this bulb to replace the standard household incandescent bulb. This bulb allegedly uses 1/3 the energy of an incandescent bulb and lasts 4 or more times longer. As mentioned previously, several RF fluorescent type bulbs have also been designed to fit in the same socket as a regular incandescent bulb. Compared to the incandescent bulb, these RF fluorescent bulbs are much more energy efficient (allegedly only using 1/4 the energy).

7. While these RF lighting bulbs have residential application, it is expected that the major use of RF lighting sources will initially be in the commercial and industrial area to replace the standard flourescent fixtures or incandescent lamps. Commercial and industrial purchasers of lighting devices are more apt to take all costs into account including long term energy costs. The residential consumers, on the other hand, may not be as willing to spend additional money for an expensive RF light bulb even though it may save them money over the long run.[3] However, in the future, with increasing residential consumer awareness, the rising costs of energy, and the probable narrowing of the price differential between standard and RF bulbs, the new RF lighting devices could reach a significant portion of the

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[2] The RF choke is necessary to limit the current that flows when the arc is struck and serves the same function as the magnetic coil in the conventional electromagnetic ballast. The RF choke need not be set out as a separate component, but it is usually incorporated in the circuitry that produces the RF energy.

[3] Currently developed household RF light bulbs are expected to sell for a significantly higher price than the standard incandescent bulb. However when considering the money saved in reduced energy consumption over the life of the bulb, an individual could justify paying more for an RF light bulb.

residential market and could become a significant part of the overall lighting market.

Present Requirements

8. Currently, under the Commission's Rules, RF lighting devices meet the definition for industrial, scientific and medical (ISM) equipment regulated by Part 18.[4] Under these rules RF lighting devices fall within the category of Miscellaneous Equipment in Subpart H which includes, among other devices, apparatus in which RF energy is applied to materials to produce physical, biological or chemical effects such as ionization of gases, etc.[5]

9. Part 18 requirements, however, were never intended to apply to mass produced or consumer items. Rather, these requirements were designed to govern large industrial equipment such as industrial heaters. The current radiated emission limit for Part 18 equipment may not provide sufficient protection against interference to consumer devices. In addition, for most Part 18 equipment, there is no conducted emission limit. These liberal standards, accordingly, are inappropriate when applied to products having a widespread use in commercial and residential locations.[6]

10. In the proceeding in Docket 20718 instituted by a *Notice of Inquiry* in 1976 followed by a *Notice of Proposed Rule Making* in 1978, we had proposed to reduce the allowable radiation emissions from ISM equipment, add a new power line conducted interference limit, and simplify the equipment authorization requirements for ISM equipment.[7] In that proceeding, we noted that the rules in Part 18 pose an administrative burden on manufacturers of certain ISM equipment. One of the most burdensome is the requirement for detailed certification and re-certification every three years for medical diathermy and miscellaneous ISM equipment operating on non-assigned ISM frequencies.[8] When the Part 18 rules were

[4] Section 18.3 (f) defines ISM equipment as "[d]evices which use radio waves for industrial, scientific, medical or any other purposes including the transfer of energy by radio and which are neither used nor intended to be used for radio communication".

[5] Section 18.3 (d). RF lighting devices contain materials and gases which are excited to emit light by the application of an RF voltage.

[6] Products which are widely distributed in a residential and commercial environment require tighter emission limitations because of the greater chance of their operation in close proximity to or on the same electrical circuit as a radio or TV receiver.

[7] Docket 20718: In the matter of overall revision of Part 18 governing Industrial, Scientific, and Medical (ISM) equipment. *Notice of Inquiry* adopted March 9, 1976 and released March 15, 1976 (41 FR 11626). *Notice of Proposed Rule Making* adopted September 19, 1978 and released September 29, 1978 (43 FR 46326). *Second Notice of Proposed Rule Making* adopted January 1, 1979 and released January 29, 1979 (44 FR 9771).

[8] The non-assigned ISM frequencies are all frequencies other than those specifically assigned for ISM purposes as listed in Section 18.13. The assigned ISM frequencies

adopted, equipment subject to recertification was usually large and very frequently unique. Under these conditions recertification was not considered to be overly burdensome, and it insured that the equipment would continue to comply with our technical standards. However, with the introduction of mass produced and particularly residential consumer items, such as RF lighting devices, we recognize that recertification every three years poses an impractical requirement and had proposed to eliminate this requirement in the proceeding in Docket 20718.

11. In 1980, the Commission granted a waiver of the recertification requirement to the General Electric Company to allow it to produce a limited quantity (up to 10,000) of the GE Electronic Halarc light bulb.[9] Later, at the beginning of 1981, we revised this waiver to eliminate the limitation on the numbers of bulbs that could be produced under the waiver.[10] Three other manufacturers of RF lighting devices have recently filed similar requests for waiver of the re-certification requirement. These petitions for waiver are being considered in a companion *Order Granting Limited Waiver*. These petitions demonstrate the need to develope a policy concerning RF lighting devices.

Discussion

12. The interference potential of RF lighting devices is considered the central issue in this inquiry. Any future regulatory action that we take is directly dependent upon the potential that these devices have to become sources of interference to licensed communication services. Since these devices are relatively new, there is a lack of information on their interference potential. We trust that this inquiry will aid in supplying us with the needed information concerning this question. In addition to responses from the RF lighting industry, we seek comments from other parties particularly those associated with licensed radio communication services which may be affected by emissions from RF lighting devices. We are specifically looking for supporting data, e.g., mathematical analysis, emphirical results, and modelling, to substantiate any claims of interference potential or lack thereof.

13. In addition, test data would be helpful to the Commission in

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are:

13.56 MHz ± 6.78 kHz	915 MHz ± 13 MHz
27.12 MHz ± 160. kHz	2450 MHz ± 50 MHz
40.68 MHz ± 20. kHz	24.125 GHz ± 125 MHz

[9] *Order Granting Limited Waiver* adopted July 17, 1980 and released July 23, 1980 (FCC 80–418, 45 FR 51649).

[10] *Order Expanding Limited Waiver* adopted January 29, 1981 and released February 4, 1981 (FCC 81–25).

corroborating any predictions concerning interference potential. In this respect, measurements were performed on several sample RF light bulbs at the Commission's Laboratory.[11] Emissions from these bulbs were found to be very broadband with measurable emission spanning the frequency range from 10 kHz up to 80 MHz. Our test data showed that the RF light bulbs were able, for the most part, to meet considerably tighter emission limits, such as those applicable to computers, than the limits now in the Part 18 rules. At the same time, we noted that these bulbs were capable of interfering with AM broadcast radio reception. We question whether technical standards designed to limit emissions from ISM equipment in general would be adequate to protect the communications services from harmful interference caused by RF light bulbs especially when considering the unique broadband nature of the emission from these bulbs.

14. In controlled laboratory tests, AM radios received objectionable interference via radiation up to a distance of several meters away from the RF light bulbs tested. In addition, emissions on the power line also resulted in interference to AM radios especially those connected to the AC power line. Tests performed in several homes verified that a potential does exist for harmful interference to AM radio reception. However, because of house wiring differences and other factors, results varied from one home to the next. The home tests are inconclusive at this point, but we are hopeful that the larger real world survey to be accomplished through the associated waivers using a substantial number of bulbs will provide us with a reasonable assessment of the actual degree of interference potential posed by RF lighting devices to AM broadcast and other services. In any case, we are particularly interested in comments regarding the interference potential presented by RF lighting devices to AM radio reception or any other radio service.

15. Further, we are interested in gathering information about the emission characteristics presented by different types of RF lighting devices. We are also interested in comments regarding appropriate technical emission standards, both radiated and conducted, which could restrict emissions from RF lighting devices to levels that would not cause harmful interference. Comments concerning an appropriate measurement procedure to determine compliance with any proposed emission standard would also be beneficial to this inquiry.

Questions

16. The following questions are representative of our concern about RF lighting products. In addition to the FCC generated questions, the list also includes questions contributed by the

[11] *See* the Technical Memorandum from Philip M. Inglis to the Chief, Authorization and Standards Division, dated February 25, 1983, file No. 31030/EQU/4–0.

Lighting Division of the National Electrical Manufacturers Association (NEMA).[12] Commenters are requested to identify each question being answered with the appropriate designator. We also invite comments not directed to any particular question as long as it is related to the general subject matter of this proceeding. Answers should include adequate justification and data, when appropriate.

REGULATION AND STANDARDS

Q 1. What kinds of RF lighting devices and systems are on the market or are being developed with a description of each? Also, is there any information available concerning the interference potential of each such device or system.

Q 2. How should RF lighting devices be regulated? Should the FCC regulate such devices as part of an official rulemaking or should the Commission give the lighting industry a chance to develop a voluntary industry standard through an organization such as NEMA?

Q 3. What are the principal categories of RF lighting devices? Should each category be regulated differently? Should there be different categories by lamp type or industrial use? Or should there be different standards for differing environments, for examples, one standard for residential use, one for factory use, one for sensitive areas such as hospital intensive care units, etc.?

Q 4. Should there be standards which apply to *groups* of low powered lamp systems, such as areas with many fluorescent fixtures, and other standards that are applicable to high powered systems that may have fewer lamps, such as 20 kilowatt short-arc xenon area lighting? Should some systems have standards which apply both to elements of the system and to the system as a whole?

Q 5. Should there be one standard that includes both conducted and radiated interference or should there be separate standards?

Q 6. Should there be specific standards for fixtures or systems intended to reduce radiated RFI? (Should lighting specifiers or consumers be given the option of selecting lighting products with "interference ratings"?)

Q 7. Should manufacturers label each product, particularly consumer RF lighting devices, to provide user information to educate consumers and users about the interference potential of the device.

Q 8. Should standards include operation of systems in an abnormal mode, (such as rectifying lamps, shorted or open lamp elements)?

Q 9. Should RF lighting products be moved from Part 18 of FCC Rules and Regulations to Part 15? Should a totally separate, new Rule Part be established for RF lighting devices?

Q 10. Should the lighting industry, through a representative committee, establish limits on RF emission? If so, which organization is best suited and able to lead the lighting industry in establishing and policing the standards that the industry imposes upon itself? If industry accepts the responsibility of policing itself, what is the best manner to enforce the standard developed to ensure the EMI product quality will be maintained.

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[12] Our concern of the potential interference from RF lighting devices had been raised in discussions with the Lighting Division of NEMA. As a result of these discussions, NEMA contributed a list of questions for which answers are required before a sound regulatory policy can be developed for RF lighting devices.

Q 11. Would an administrative program of notification and verification by the manufacturer be acceptable to assure adequate compliance? See 47 CFR Part 2, Subpart J, for an explanation of the Commission's equipment authorization program.

Q 12. Should the standards be based upon existing international or foreign government standards? If so, which ones? Should it be a guideline for establishing the one in the United States.?

EMISSION LEVELS AND LIMITS

Q 13. What is the effect of the use of multiple RF lighting devices in one location on the interference potential?

Q 14. Should there be different limits for interference which may occur for brief periods, such as lamp starting or warm-up, than for more persistent or continuous emissions, as during lamp operation? If so, should intermittent and continuous cases include both conducted and radiated emission limits? Should a derating curve of emission intensity versus emission duration exist?

Q 15. Should bands of frequencies be alloted solely for use by RF lighting devices and systems? If so, how many and at what frequencies? Should RF lighting devices and systems be restricted to special frequencies?

Q 16. Should harmonic content of interference be specified as well as amplitude (intensity) and direction (spatial characteristics)?

Q 17. Should emission level limits, whether imposed by rulemaking or by industry standards, reflect different environments such as residential (consumer), commercial, or industrial? If so, what is the justification and rationale? If not, why not?

Q 18. How additive are the effects from multiple sources? Does industry data indicate some relationship in actual installations? Do multiple unit installations represent a significantly greater potential for interference than do individual devices?

Q 19. What emission level limits are appropriate for RF lighting devices? Discuss radiated and conducted limits and a rationale for recommended limits. Discuss an appropriate model for developing such limits.

Q 20. Should emission limits be established for a "system" consisting of a lamp, ballast, and fixture? Or should emission limits be set for lamp and ballast combinations?

Q 21. How shall lighting systems be treated that distribute RF energy to the fixtures over a set of dedicated wires instead of using individual electronic ballasts in each fixture? What limit shall be placed on the radiation of RF energy from the wiring? On the RF energy fed into the wires?

MEASUREMENTS

Q 22. What is an appropriate test methodology for determining the interference potential for each type of RF lighting device? Are both conducted and radiated measurements required? What are the conditions for each? Or, is some other test methodology more suitable?

Q 23. Should there be different test equipment for different frequency ranges? What should the measurement procedure be? Should consideration be given to polarization of the radiated interference? In what units should the measurements be recorded and reported?

Q 24. What line impedance stabilization network (LISN) should be used for conducted measurements? How should conducted measurements of RF lighting devices be taken?

Q 25. What should the setup be for radiated RF emissions? What type of antenna should be used? Should the testing be done in a special test chamber or in a working installation? What distances should be employed and should different distances be used for different frequency bands?

Q 26. Under what operating parameters should RF lighting devices be measured?

Q 27. What detector function and bandwidths should be used for measurements? Should the same detector and bandwidth be used across the entire frequency spectrum?

Q 28. Is measurement of radiated emissions in near rather than far fields an issue for these products?

Q 29. Can existing testing methods be incorporated or adopted? Which ones?

Q 30. Over what frequency range or bands are conducted and radiated emissions to be monitored?

Q 31. What test methodology is suitable for measuring compliance of distributed RF lighting systems?

SUSCEPTIBILITY AND INTERFERENCE

Q 32. What government and non-government radio communication services would be susceptible to emissions from RF lighting devices, and to what degree should protection be provided for each authorized radio service?

Q 33. What are the emission characteristics and signatures of the various RF lighting devices? How does a susceptible receiver respond to these characteristics?

Q 34. What products are likely to be interfered with by such RF lighting devices? What levels of protection will preclude harmful interference?

Q 35. What has been the industry history and experience to date on interference from traditional (non-RF) lighting devices?

Q 36. What are the ambient levels of radiation and conducted radio noise that already exist in typical residences and commercial structures? Does RF lighting significantly raise the radiated or conducted levels in actual field installations?

Q 37. What has been the industry experience with such RF lighting systems to date? What about the neighbors of such systems? Have there been instances of harmful interference from existing RF lighting installations?

TECHNOLOGY

Q 38. What does the emerging RF lighting industry predict as far as future directions of RF lighting sources? What frequencies of operation are likely to be employed?

Q 39. What emerging communications products might find these new RF lighting devices to be a potential problem?

Q 40. Do emissions from current products meet any existing RFI limits?

ECONOMICS

Q 41. What is the economic benefit to the user and the public from these new RF lighting devices and systems?

Q 42. What amount of interference suppression is cost effective for such products? Is suppression strictly a cost issue for manufacturers or are there other factors that determine the degree of emanation control?

Procedural Matters

17. Pursuant to Sections 4(i) and 302 of the Communications Act of 1934, as amended, IT IS ORDERED that this Inquiry IS HEREBY INSTITUTED.

18. In accordance with the provisions of Section 1.415 of the Commission's Rules, interested parties may file comments on or before October 31, 1983. Reply comments must be filed on or before December 16, 1983. Pursuant to the procedures set forth in Section 1.419 of the Commission's Rules, an original and five copies should be filed by formal participants with the Secretary of the Commission. Participants wishing each Commissioner to have a copy should include six additional copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All comments should be clearly marked General Docket No. 83–806, and will be available for public inspection in the Public Reference Room at the Commission's headquarters. All written comments should be sent to: Secretary, Federal Communications Commission, Washington, D.C. 20554. For further information on this proceeding, contact Herman Garlan at (202) 653-8247. For general information on how to file comments, contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Lighting, Ratio Frequency
Rules, Waiver of

Petitions for waiver of equipment authorization requirements of Section 18.142 of rules for new radio frequency (RF) lighting devices granted. Interim relief granted in order not to delay introduction of energy saving technology.
–RF Lighting Devices

FCC 83–361

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Petitions for waiver of Section 18.142 of the FCC Rules by

–North American Philips Lighting Corp.

–International Energy Conservation Systems,

–Brigham Young University/Soli-Tronics

ORDER GRANTING LIMITED WAIVER

(Adopted: July 28, 1983 Released: August 5, 1983)

BY THE COMMISSION:

1. In the past year, the Commission received three petitions for waiver of the detailed certification and re-certification requirement of Section 18.142 for certain radio frequency (RF) lighting devices. The petitions were submitted by: North American Philips Lighting Corporation (NAPLC) on July 15, 1982, International Energy Conservation Systems (IECS) on June 7, 1982, and Soli-Tronics in cooperation with Brigham Young University on January 24, 1983. The NAPLC and IECS petitions were put on public notice on July 30, 1982 and August 5, 1982, respectively. The American Radio Relay League, Inc. (ARRL) and General Electric Company (GE) filed comments on the NAPLC and IECS petitions for waiver. Since the Soli-Tronics request is essentially identical[1] to that of IECS, it was believed that comments submitted on the IECS petition would also

[1] IECS requests a waiver for its "Ballastronic" electronic ballast. Soli-Tronics requests a waiver for the following models of electronic ballasts: Model Nos. 4024, 4120, 4124 and 8120.

apply to the Soli-Tronics request and that a separate public notice for Soli-Tronics was not necessary.

2. All three petitions are concerned with new RF lighting devices using electronic ballasts for fluorescent type bulbs. NAPLC requests a waiver for its SL-18 lamp which is similar in size and shape to a household incandescent bulb. The SL-18 bulb consists of both the fluorescent tube and an electronic ballast built into the glass envelope of the lamp. On the other hand, IECS and Soli-Tronics produce only electronic ballasts for installation in fluorescent fixtures. For convenience we will refer to both the SL-18 lamp and each electronic ballast made by IECS and Soli-Tronics as an RF lighting device.

3. The standard ballast used for fluorescent lights operates at 60 Hz - the standard power line frequency. However a fluorescent light bulb with an electronic ballast is stated to be 20 to 40 percent more energy efficient than the standard fluorescent fixture. In comparison to the household incandescent bulb, RF lighting devices are claimed to be even more energy efficient. NAPLC states that its bulb, which can be inserted into a standard incandescent socket, uses only one-fourth of the energy of a standard incandescent bulb. Since the NAPLC bulb can fit incandescent sockets and is approximately the size of an incandescent bulb, it will have residential as well as commercial and industrial uses. The RF lighting devices developed by IECS and Soli-Tronics were developed with the commercial/industrial market in mind, but can be expected eventually to reach the residential market.

4. According to the petitions, the RF circuitry in the electronic ballast operates continuously at a high frequency between 20 and 40 kHz.[2] The first step in the operation of the electronic ballast is to convert alternating current (AC) from the power line into direct current (DC) by using a rectifier circuit[3] The DC voltage is then applied to an inverter which converts the DC energy to RF energy at a frequency between 20 and 40 kHz. This RF energy is applied to the fluorescent tube(s) by the same basic technique as that used in conventional fluorescent fixtures. The RF energy excites the gaseous compound within the tube causing the fluorescent coating material to glow and emit light.

5. Since RF energy is applied to excite gases and materials, these new RF lighting devices are considered to be miscellaneous industri-

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[2] Although most RF lighting sources operate between 20 and 40 kHz, the Commission is aware of an RF excited fluorescent lamp designed by the Litek Company which operates on the frequency of 13.56 MHz.

[3] The Soli-Tronics Model 4024 electronic ballast does not contain a rectifier to convert from AC to DC voltage. It is designed to be used in a DC distribution system where the AC to DC conversion is done at one point in the lighting system and DC voltage is then distributed to each electronic ballast and associated fluorescent fixture.

al, scientific and medical (ISM) equipment subject to Part 18 Subpart H of the FCC Rules.[4] By reference, miscellaneous equipment is subject to the requirements in Subpart E (medical diathermy equipment) of Part 18. Since the RF lighting devices operate on frequencies that are not assigned for ISM purposes, Section 18.142 is the particular regulation in Subpart E that applies. This regulation requires that each piece of equipment (RF lighting device in this instance) must be certificated (tested) and re-certificated at intervals of three years. It is evident that this requirement is completely unsuitable for RF lighting devices. Accordingly, the Commission is seeking alternative regulatory requirements. (See paragraphs 7–9 below).

6. Section 18.142, and Part 18 in general, were intended to apply to large, high power industrial, scientific and medical equipment produced in small quantities. This regulation was designed to ensure that such equipment continued to comply with the technical requirements. However, the detailed certification and re-certification requirement in Section 18.142 poses an extremely severe administrative problem to the marketing of a mass produced item such as an RF light bulb. Each bulb would have to be certificated and the user or purchaser would need to re-certificate each bulb every three years. Re-certification of an RF light bulb would provide hardly any additional protection against interference over that provided by a prototype certification prior to marketing.

7. In a separate proceeding, FCC Docket 20718, we proposed to extensively revise and update the rules in Part 18.[5] Among other contemplated changes, the proposal included deletion of the re-certification requirement, addition of a simplified certification procedure as a prerequisite for marketing, the imposition of more stringent radiated emission limits and the addition of a conducted emission limit. A tighter emission limit is particularly appropriate for mass produced commercial and consumer products such as RF lighting devices.[6] However, although consumer ISM equipment was discussed in Docket 20718, the Commission at that time did not have

[4] Miscellaneous (ISM) equipment is defined in Section 18.3(d), as equipment in which radio frequency energy is applied to materials to produce physical, biological, or chemical effects such as heating, ionization of gases,. . .which do not involve communications or the use of radio receiving equipment.

[5] Docket 20718: In the matter of overall revision of Part 18 governing Industrial, Scientific and Medical (ISM) equipment. *Notice of Inquiry* adopted March 9, 1976 and released March 15, 1976 (41 FR 11626). *Notice of Proposed Rule Making* adopted September 19, 1978 and released September 29, 1978 (43 FR 46326). *Second Notice of Proposed Rule Making* adopted January 1, 1979 and released January 29, 1979 (44 FR 9771).

[6] The current standards in Part 18 were intended to protect communication services from ISM equipment usually operated in industrial areas significant distances away from communication services.

any information on RF lighting devices. Accordingly, no specific provisions for RF lighting devices were proposed.

8. In a companion *Notice of Inquiry* we are seeking to acquire information so that we may knowledgeably proceed with minimal regulations for RF lighting devices to minimize the potential for harmful interference.[7] However, while that inquiry is pending, the Commission recognizes that technological advancements such as energy saving RF light bulbs and electronic ballasts should not be delayed access to the market as long as adequate control is maintained over the interference potential of this new technology.

9. In July of 1980, the Commission granted a limited waiver of the detailed certification and re-certification requirement in Section 18.142 to GE for 10,000 Electronic Halarc light bulbs.[8] In January of 1981, we removed the limit on the number of GE Halarc light bulbs which could be produced and marketed under the waiver.[9]

10. In an attempt to determine the interference potential of RF lighting sources, tests were performed by the Commission on the NAPLC SL-18 RF light bulb both at the FCC Laboratory and at the homes of several members of the Commission's staff.[10] Measurements taken at the laboratory indicate that emissions from this bulb are very broadband extending from 10 kHz up to approximately 80 MHz. The laboratory results show that AM Broadcast was the only broadcast service which may experience any significant interference from the SL-18 bulb. In controlled laboratory conditions, radiated interference to AM radios was noted up to distances of two meters from the bulb. With the bulb plugged into the same outlet as the radio, interference was noticed at greater distances indicating that power line conducted emissions from RF lighting sources may be of greater concern than radiated emissions.

11. Results gathered from subjective interference tests performed by using the SL-18 RF light bulbs in the homes of several Commission staff members varied significantly. Objectionable interference to AM reception in some homes was confined to situations when the AM radio was plugged into the same AC receptacle, or operating very close (within a few feet) to the bulb. However, a few individuals reported more widespread interference to AM reception in their homes. NAPLC submitted test results indicating that its

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[7] *Notice of Inquiry*, In the matter of FCC Regulations concerning RF Lighting Devices, FCC General Docket No. 83–806 adopted July 28, 1983, released August 5, 1983.

[8] *Order Granting Limited Waiver* adopted July 17, 1980 and released July 23, 1980 (FCC 80–418).

[9] *Order Expanding Limited Waiver* adopted January 29, 1981 and released February 4, 1981 (FCC 81–25).

[10] The tests are described in a Memorandum from Philip M Inglis to the Chief, Authorization and Standards Division dated February 25, 1983, file No. 31010/EQU/4–0.

light bulb did not pose a significant potential for interference to AM broadcast reception.[11] In a portion of NAPLC's tests run in several actual homes, interference was noted only in cases when the bulb was extremely close (within a foot or so) to an AM radio or when plugged into the same electrical outlet as the AM radio. Other parts of the NAPLC test report show that emission levels from the SL-18 bulb are below levels emitted by conventional fluorescent fixtures. Further, NAPLC alleges that no interference complaints have been received for a similar RF bulb marketed in Europe.

12. The limited tests performed up to this point only show that in some situations interference can occur to AM broadcast reception due to emissions generated by an RF lighting device. However, the number of times such situations will occur and the severity of any resulting interference is dependent upon many factors such as location and environment of product use, proliferation of the product, emission characteristics, the prevailing conditions at the particular location of use (i.e. susceptible receivers).

13. With respect to the location and environment of use, the RF lighting devices developed by IECS and Soli-Tronics will be operated for the most part in commercial office buildings and industrial plants. Compared to consumer equipment used in residential areas, these commercial/industrial RF lighting devices will usually be further away from susceptible receivers, and therefore less likely to cause interference problems. As noted previously, the Soli-Tronics RF lighting devices can be operated in two different types of system configurations, and each configuration may present a different interference potential. In one configuration, standard AC voltage is distributed to each lighting fixture which contains an electronic ballast which generates RF energy and applies this energy to the fluorescent tube. In the other configuration one main rectifiers is used for the entire system. The DC voltage is distributed to each lighting fixture which contains a simplified electronic ballast—an electronic ballast without the individual rectifier. It is claimed that the single large rectifier is more efficient than the multiplicity of small rectifiers, thus further improving the energy efficiency of the system. Each configuration could result in different levels of RF energy on the distributed wiring directly affecting the interference potential of the system.[12]

14. On the other hand, due to its capability of replacing a regular incandescent bulb, the NAPLC RF lighting device will eventually have application in residential as well as commercial/industrial environments. Because of the greater possibility of close proximity

[11] Test report regarding the SL-18 Lamp filed by NAPLC on April 8, 1983.

[12] The Commission is aware of another RF lighting system which is composed of one main unit that performs all the voltage conversions (AC to DC to RF) and then distributes the RF voltage to all the fluorescent fixtures in the system.

operation to AM radios, residential operation of the light bulb may lead to more interference complaints. However, since the NAPLC bulb is more expensive than the standard household incandescent bulb, NAPLC contends that, at least initially, most of these bulbs will be used in commercial and industrial locations.

15. With regard to emission characteristics, the NAPLC, IECS, and Soli-Tronics RF lighting devices all operate on the same basic principle and so are expected to have similar emission characteristics. It is important to note that the emissions characteristics from these devices is broadband and as a result has a different interfering affect than most other ISM equipment, which exhibit narrowband emissions. Accordingly, the existing emission limitations in Part 18 are not directly applicable to RF lighting devices and can not be relied upon by manufacturers as a valid guideline to design to hold emissions from their products to tolerable levels. Our evaluation of the NAPLC bulb appears to substantiate this contention. The lab results show that the NAPLC RF lighting source did meet currently established standards for other equipment such as personal computers, etc.; however, significant interference was still caused to AM radio reception in the same household.

16. In view of the large number of variables affecting the interference potential of RF lighting devices, a determination of the actual interference potential presented by these products is most practical through experience gained in actual use. However, the commenters, both ARRL and GE, are concerned about widespread interference problems which may develop and urge the Commission not to grant a waiver for these new RF lighting devices until an adequate showing is made concerning their interference potential. The limited testing performed in several homes with the NAPLC RF lighting source does not provide the Commission with a large enough statistical base to draw accurate conclusions about the interference potential. Based on our experience with the limited waiver granted to GE, we believe that a real world interference survey based on the use of 10,000 RF lighting devices from each petitioner manufacturing electronic ballasts and 100,000 RF light bulbs by NAPLC would provide a valid assessment of interference potential for each type of RF lighting device.[13] [14] At the same time, by limiting the prolifera-

[13] Footnote 5, supra. GE actually made improvements to reduce the interference potential of its bulb with the aid of the actual market survey conducted with a limited number of bulbs. See the reports submitted by GE as a requirement under its waiver. These reports are available for inspection in the RF Devices Branch file No. 4–3–7.

[14] The selection of the number of units to be initially authorized is based on several factors. The first is the need to have a sufficiently large test sample to adequately determine the interference potential of RF lighting sources in a variety of locations and environments. The second is our concern to limit widespread interference. Considering these two factors and our concern not to hamper a manufacturers marketing plan, we have selected 10,000 units for electronic

tion of these new RF lighting sources, we maintain an adequate control over interference potential, thereby reducing the concern expressed by the commenters. Moreover, by granting the waiver, and relieving the petitioners of burdensome administrative requirements, we permit this energy saving technology to develop and be introduced into the marketplace without delay.

17. We are also imposing the radiated and conducted limits in for computing devices Subpart J of Part 15 of the Rules on RF lighting sources marketed under the terms of this waiver. While we recognize that these limits may not be completely satisfactory, as stated in paragraph 15 above, we believe some minimal technical limits are necessary to place a cap on the interference potential of these devices. RF lighting devices intended for use in industry and commercial environments will be subject to the technical limits for a Class A computing device. RF lighting marketed for use in residential areas will have to meet the limits for a Class B computing device. It may be possible that the subject RF lighting devices will have to add additional EMI suppression in order to comply with these limits. We believe that this is not an unreasonable burden for manufacturers of these bulbs. Alternatively, however, the manufacturer must satisfy the Commission that its bulb or ballast is not a major interference source.

18. Accordingly, we are limiting this waiver of the equipment authorization requirements in Section 18.142 for a total number of 10,000 (100,000 for NAPLC) RF lighting devices for each petitioner to be used in field testing and market evaluation. Each petitioner is required to submit periodic reports concerning all interference problems resulting from operation by its RF lighting device. The results of the experience derived from actual use of these RF lighting sources will also be useful to the Commission by providing real world data to supplement information generated through the associated *Notice of Inquiry*. In addition, the Chief Scientist is delegated authority to waive the requirements of Section 18.142 for other manufacturers of RF lighting devices subject to the same conditions herein. Further, the Chief Scientist is delegated authority to increase the number of RF lighting devices covered by this waiver if significant interference problems do not result.

19. The Commission hereby grants a limited waiver to NAPLC, IECS and Soli-Tronics subject to the conditions below:

(a) This waiver authorizes the manufacture and marketing of 10,000 electronic ballasts each by International Energy Conservation Systems and Brigham Young University/Soli-Tronics and 100,000 RF lighting bulbs (SL-18) by North American Philips Lighting Corp. to be used in field testing and evaluations.

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ballasts and 100,000 units of the SL-18 bulb. The larger number for the NAPLC is based on the detailed test program plan submitted by the firm as a supplemental information to their petition.

(b) A report of measurements of both the conducted and radiated emissions from the RF lighting device along with ten samples of the lighting device shall be submitted to the FCC Laboratory for examination.

(c) Grantee shall make a study of the cumulative effect of a large number of devices installed in one plant and all connected to a single wiring system on the amount of radio frequency interference created and how this correlates with the radio frequency interference caused by a single device. A report of this study shall be submitted within six months.

(d) Reports of all radio frequency interference (RFI) experiences resulting from the operation of RF lighting devices under this waiver shall be submitted to the Commission at intervals of three months.

(e) The RF lighting device (or system) shall be certificated by the Commission pursuant to Subpart J of Part 2 to show compliance with technical requirements in Subpart J of Part 15 for Class A equipment if the RF lighting device (or system) will be used in a commercial/industrial environment or for Class B equipment if the device will be used in a residential environment.

(f) The following information shall be printed on the package containing the RF lighting device so that it will be clearly visible to the purchaser.

This device is being sold pursuant to a waiver of FCC rules as part of an experiment to determine whether it causes harmful interference to AM radios in or around the user's dwelling. Any interference should be reported to (fill in company name, contact person, and address).

(g) If a significant interference problem is caused by the devices authorized under this waiver, the Chief Scientist is authorized to instruct the manufacturer of the device in question to discontinue marketing the device until corrective measures are taken. Marketing may be resumed only on instructions from the Chief Scientist.

20. Pursuant to Section 1.3 of the Commission's Rules, since good cause has been shown, the NAPLC, IECS and Soli-Tronics petitions for waiver of the re-certification requirements of Section 18.142 ARE GRANTED subject to the conditions set out in paragraph 19 above. This waiver shall terminate 30 days after the effective date of any rules adopted by the Commission concerning operation of RF lighting devices.

21. IT IS FURTHER ORDERED that the Chief Scientist is authorized to increase the number of RF lighting devices covered by this waiver and to grant, subject to the same conditions, similar waiver requests which are filed by other parties and adequately justified. The petitioner must file the following minimum information.

(a) A detailed description of the RF lighting device.

(b) A statement why the present rules are unsatisfactory and why it is in the public interest to grant the waiver.

(c) A statement that the RF lighting device will comply with the conditions set out in paragraph 19 above.

22. Pursuant to Section 1.427(b) of Part 1 of the Commission's

Rules, since it relieves a regulatory restriction, this ORDER shall become effective on August 5, 1983.

23. Further information about the waiver may be obtained from Herman Garlan at (202) 653–8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Financial Qualifications
Ownership and Management, Integration of
Remand

Proceeding remanded on a financial issue and on a comparative issue to explore integration proposal.
–*Washington's Christian TV Outreach, Inc.*
BC Docket No. 81–528

FCC 83R–62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WASHINGTON'S CHRISTIAN TELEVISION OUTREACH, INC. Washington, D.C.	BC Docket No. 81–528 File No. BPCT-5042
CENTURY COMMUNICATIONS, INC. Washington, D.C.	BC Docket No. 81–529 File No. BPCT-800117KE
CAPITAL COMMUNICATIONS OF WASHINGTON, INC. Washington, D.C.	BC Docket No. 81–530 File No. BPCT-800118KF
GRANT BROADCASTING CORPORATION Washington, D.C.	BC Docket No. 81–533 File No. BPCT-800118KK
URBAN TELECOMMUNICATIONS CORPORATION Arlington, Virginia	BC Docket No. 81–536 File No. BPCT-800118KN
WASHINGTON TELEVISION, INC. Washington, D.C.	BC Docket No. 81–537 File No. BPCT-800118KO
WSCT-TV, INC. Washington, D.C.	BC Docket No. 81–538 File No. BPCT-800118KP

For Construction Permit For New UHF Television Broadcast Station

MEMORANDUM OPINION AND ORDER

(Adopted: August 25, 1983; Released: August 31, 1983)

BY THE REVIEW BOARD:

1. This proceeding is before the Board on the exceptions (and associated pleadings) of seven applicants for the Construction Permit for UHF Channel 14, Washington, D.C.[1] That television frequency became available when the Commission revoked the license of the previous occupant of that channel, WFAN-TV. *United Television Co., Inc.*, 46 FCC 2d 698 (1974). The applications of the successor-aspirants were designated for consolidated comparative hearing by the Commission on August 19, 1981.[2] Notwithstanding the multiplicity of applicants and issues in this proceeding, and a litigiousness intensified, no doubt, by the perceived value of the prize, Administrative Law Judge Edward J. Kuhlmann (ALJ) well-superintended the hearing and delivered in workmanlike course a 51-page *Initial Decision*.

2. After reviewing the exceptions, briefs, and the record in the case, as well as hearing oral argument by the parties on June 28, 1983,[3] the Board is of the view that further limited evidentiary exploration is needed with respect to several matters, all of which could be decisional in this important case. Although the Board is institutionally disinclined to casually remand a proceeding for further hearing, thereby protracting somewhat the comparative process, *see, e.g., Valley FM Radio*, 53 RR 2d 1195, 1196 (Rev. Bd. 1983), the Board has done so where uncertain inferences from the extant record would be critically inferior to deliberate factual fortification. *Cf. Bernard J. Winner*, 75 FCC 2d 300 (Rev. Bd. 1979). While the Board might help alleviate certain of the factual uncertainties in this existing record by requesting "paper" submissions on these troublesome questions, *see generally*, 47 C.F.R. § 0.365(a), the Board is largely without those procedural devices best suited for eliciting more definitive evidence, *see* 47 CFR Part 1, Subpart B ("Hearing Procedures" - discovery, testimony and cross-examination, *etc.*), and that imbue our adversary process with the unique potential

[1] One of the applicants, however, Urban Telecommunications Corporation, has specified Arlington, Virginia as its city of license and seeks a dispositive comparative preference based on Section 307(b) of the Communications Act, 47 U.S.C. § 307(b). *See Initial Decision* ("*I.D.*"), FCC 83D-2, released January 24, 1983 (E.J. Kuhlmann, ALJ). Our use of the Washington, D.C. designation with respect to the location of the channel implies no decision on the § 307(b) issue.

[2] *Hearing Designation Order*, BC 002820, *reprinted at* 46 Fed. Reg. 43737 (August 31, 1981).

[3] *See* Transcript of Oral Argument in re *WSCT-TV, Inc.*, BC Dkt. Nos. 81–528 *et seq.*

to lay bare factual conditions and to peer beneath artful legal rodomontade. Hence, rather than leave the resolution of the open decisional questions to disembodied collegial intellection, the Board has decided in this case to heed its own Polonian caveat that "it is better to be safe than sorry,"[4] and to remand the proceeding so as to assure to the extent possible the precision of the factual bearings on which the ultimate decision will turn.

3. In the *I.D.*, and by way of brief background, the ALJ concluded that the "deciding factor" in this case was the integration criterion and that grant of the application of WSCT-TV, Inc. (WSCT-TV) would best serve the public interest because the "level of participation" proposed by WSCT-TV's owners in station operations was "the highest of all applicants." *I.D.*, para. 156. He ranked the applicants as follows: (1) WSCT-TV; (2) Washington's Christian Television Outreach, Inc. (WCTO); (3) Washington Television, Inc.; (4) Capital Communications of Washington, Inc.; and (5) Century Communications, Inc. Urban Telecommunications Corporation (Urban) and Grant Broadcasting Corporation were omitted from the comparative rankings because the ALJ found that neither applicant had established its basic qualifications.

4. *Urban's Financial Qualifications.* Our initial concern relates to the disqualification of Urban under a financial issue. Urban proposes the full-time integration of its solitary black stockholder, Theodore R. White, and - if found qualified - would be a likely front-runner in this contest on other relevant comparative criteria. In disqualifying Urban, the ALJ reasoned that a financial issue had been specified initially by the Commission, that Urban made no attempt to correct the inadequacies in its original financing plan until a few days before hearing, and that instead of reforming its original showing, the applicant presented an entirely new plan for review. *I.D.*, para. 136. The amended Urban financial proposal relied upon a lease arrangement with AMVEST Leasing and Capital Corporation (AMVEST), under which AMVEST would provide up to $2,500,000 to purchase the equipment which would then be leased to Urban. Its proposal also contemplated a bank loan to $922,916.67 ($1,000,000 minus interest of $77,083.33) from the National Bank of Commerce of Washington, D.C. (NBC), that loan to cover the ($732,840.35) lease payments as well as operating and miscellaneous expenses. But, the ALJ held that Urban did not demonstrate that AMVEST itself had the ability to lease the equipment; or, even if the AMVEST arrangement were credited, that the ($1,000,000) loan from NBC would be available. In that latter regard, the ALJ noted that inasmuch as the Urban loan exceeded the statutory limit that NBC could loan unitarily, NBC would need to rely on correspondent banks to supply the balance; he found that there was no assurance

[4] *WHW Enterprises, Inc.*, 89 FCC 2d 799, 808 (Rev. Bd. 1982).

that any correspondent banks would participate in the loan. Thus, he concluded that Urban was financially unqualified.

5. We believe that the ALJ was hasty in completely disqualifying Urban under this issue and hold that Urban should be afforded an appropriate opportunity to support its amended financial plan. Although the *I.D.* observes that Urban waited until just before the commencement of the hearing to rectify its financial proposal, Urban correctly claims that it filed its amendment concerning AMVEST within 30 days after the financial issue was designated and advised that it was actively negotiating to secure a bank loan. Hence, while an amendment containing the NBC loan commitment letter was not filed until the eve of the hearing, the parties were not seriously prejudiced thereby since the signatory of the NBC letter testified at the hearing. Next, though the ALJ exercised his broad discretion in requiring that Urban establish AMVEST's ability to lend (such ruling being supported by Section III, para. 4 of the application form then being utilized), Urban had a colorable basis for uncertainty as to whether it was required to prove that entities such as AMVEST were *prima facie* financially qualified to lease equipment to applicants. For example, in *Cypress Communications, Inc.*, 88 FCC 2d 994 (ALJ 1981), *aff'd* 88 FCC 2d 990 (Rev. Bd. 1982), an applicant (ultimately the successful applicant) was found financially qualified despite the fact that, as here, it had not submitted a separate financial showing for the leasing corporation on which it was relying to establish its own financial qualifications; it merely submitted a letter from the financing corporation stating that it was a *bona fide* institution, and nothing to the contrary had been submitted by the other parties. *See* 88 FCC 2d at 1015. Moreover, in *Cypress*, the particular financing corporation involved had been noticed by the Commission as a qualified financial institution in another proceeding. *Id.* Here, Urban proffered AMVEST's Annual Report (1981) which indicated that it had financed over $21 million of equipment during 1981, and more than $170 million since 1970.[5] Further, as in *Cypress*, AMVEST has been noticed as a lending company in another Commission proceeding, *see Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 28–29 (Rev. Bd. 1982); and, perforce, it even appears that one of the other competing applicants in this very case (WCTO) is also relying on AMVEST for a similar leasing arrangement. That applicant's financing was never challenged, nor was it called upon, as was Urban, to prove AMVEST's independent ability. *See* Urban Exh. 10 (rejected by ALJ). In view of all of the above, we believe that Urban should be afforded an equitable opportunity to make its showing; and, in that connection, if AMVEST has been presumed qualified to finance another applicant

[5] The Annual Report was not admitted into evidence because Urban did not produce a sponsoring AMVEST witness.

herein, it seems only fair to treat all applicants alike. Similarly, with respect to the NBC commitment letter, several authorities have been cited which appear relevant, *e.g.*, *Cherokee Broadcasting Co.*, 8 FCC 2d 138 (Rev. Bd. 1967); *CBS, Inc.*, 49 FCC 2d 1214 (Rev. Bd. 1974). While those cases may be somewhat distinguishable, both the Commission and the Board have noted the difficulty faced by minority applicants in securing financing. *See*, respectively, *Muncie Broadcasting Corp.*, 54 RR 2d 42, 47 (1983); *Bison City TV 49, supra*, 91 FCC 2d at 30 n.5.[6] As in the latter case, Urban's swift disqualification appears unduly harsh under the totality of circumstances present, and we will reverse that ruling. *See generally Anax Broadcasting, Inc.*, 87 FCC 2d 483, 487–88 (1981).

6. *Syncom Agreement.* Our next concern involves the integration proposal of the top-ranked applicant, WSCT-TV, which the ALJ found was entitled to 78.04% full-time, and 13.77% part-time, quantitative integration credit.[7] WSCT-TV, Inc. is wholly owned by Formula Telecommunications, Inc. (Formula); the two corporations have, in the main, common officers and directors, and 91.81% of the owners of Formula propose to work at the new facility. The ALJ awarded WSCT-TV with the above integration percentages notwithstanding arguments raised by the competing applicants that a financing contract between Formula and Syndicated Communications, Inc., and its wholly owned subsidiary Syndicated Capital Corp. (collectively "Syncom"), compelled that WSCT-TV's integration proposal be reduced by as much as 26% to reflect inchoate Syncom equity in Formula. Such a reduction, of course, would significantly diminish WSCT-TV's chances of success in this proceeding. The Syncom agreement, dated January 14, 1981, provides, in pertinent part, that:

> . . . in consideration of a loan of $10,000 dated January 9, 1981 made by Syncom to [Formula], [Formula] agrees to provide Syncom *with a right to purchase warrants and to participate in the financing . . . of [Formula's station* . . . as outlined in Syncom's commitment letter to [Formula] dated December 17, 1980. [WCTO Exh. 1, Agreement (emphasis added).]

The referenced December 17, 1980 letter is, in part, a loan commitment from Syncom to Formula whereby Syncom promises to loan Formula up to $500,000: the first $300,000 is to be available upon grant of the Construction Permit; the other $200,000 is to be available during the first year and one-half after closing on the first portion of the loan. The Syncom letter further states that, upon

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[6] Not to the contrary is *Coastal Bend Family Television*, 54 RR 2d 367 (Rev. Bd. 1983). There, the applicant not only misstated grievously its original financial qualifications, it did not submit an amended (and again flawed) financial plan until 11 months after the hearing had been ended. In this case, Urban cannot be charged with a similar lack of diligence.

[7] The *I.D.* shows the figure as 77.64% (*I.D.*, para. 158) rather than 78.04%, but the former figure is apparently the result of a slight mathematical miscalculation.

making the loan, Syncom would receive warrants entitling it to purchase from 10% to 26% of the Formula's common stock, the precise percentage contingent on Formula's success in raising $1,000,000 in additional equity participation. Syncom, it seems, would receive warrants for the full 26% if Formula does not either raise $1,000,000 in additional equity or if Formula borrows the ($200,000) second portion of the loan. Furthermore, the deal gives Formula the right to acquire (call) the warrants held by Syncom; and, Syncom has the right to sell (put) its warrants to Formula at fair market value during the fifth through the tenth year after the loan closing. The cost to Syncom of purchasing the Formula warrants would be, apparently, a penny a share (a maximum of $20); and, the cost of converting the warrants into Formula common stock would be only ten cents a share (a maximum of $200).

7. The ALJ found the Syncom interest in Formula too indefinite to attribute to it a cognizable equity ownership interest. *I.D.*, para. 161. Thus, he rejected the contention that the January 14, 1981 agreement gave Syncom a currently vested right to the warrants, and he accepted WSCT-TV's contention that it neither relies upon the loan from Syncom nor has it indicated that it, in fact, will borrow the money from Syncom. He also noted that even if Syncom lends money to Formula and receives the warrants, Formula would have the right to have Syncom return the warrants in exchange for their fair market value from the fifth to the tenth years. *Id.*, at para. 162.

8. Almost all of the competing applicants urge in their exceptions that the ALJ fatally erred in disregarding the potential impact of the Syncom agreement on WSCT-TV's ownership integration level. Essentially, they argue: (1) that the decision on whether to participate in WSCT-TV's financing was transferred exclusively to Syncom by the January 14, 1981 agreement; (2) that Syncom therefore has an irrevocable right to acquire an equity interest in Formula of at least 10%, and as much as 26%, for a nominal price; (3) that George Corbin III, a stockholder of Formula (and WSCT-TV's proposed general manager) testified that there were no plans to solicit additional equity participation (Tr. 1661) which would, therefore, accord Syncom the unimpeded right to acquire the full 26% of the warrants; (4) that Syncom's right of equity participation is imminently exercisable; (5) that consideration for Syncom's purchase rights was supplied, in part, by a January 9, 1981 loan of $10,000 to Formula, money which Formula evidently needed *post-haste* (*see* WCTO Exh. 14, Agreement); (6) that given the value of a television station in a major market and the nominal cost to Syncom to convert the warrants to Formula common stock, it must be conclusively presumed that the conversion will occur; and (7) that should Syncom convert the warrants to stock prior to the fifth year, Formula's right to repurchase the warrants would be lost since the right apparently applies only to warrants. Exceptors also argue that

should Formula decide to raise additional outside equity, its instant ownership level would be further diluted. WSCT-TV responds that it (*i.e.*, Formula) has the sole right to decide whether Syncom can participate in its financing, and that Syncom cannot exercise the warrants until after ten years because of the put/call provisions.

9. We believe that essential questions remain as to whether Syncom's relationship with WSCT-TV's parent, Formula, portends an integration level that is either illusory or too ephemeral to credit as the dominant basis of a license award.[8] It has been held that the Commission will take cognizance of options that are adverse to the interests of its applicants in the absence of evidence that the options will not be exercised. *See Radio Laredo, Inc.*, 87 FCC 2d 353, 354 & n.14 (Rev. Bd. 1981), *review denied*, FCC 82–62, released February 3, 1982, *aff'd sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982).[9] Here, neither the fact that WSCT-TV claims that it does not need to borrow funds from Syncom to be basically qualified, nor that Formula possesses the right to have Syncom return the warrants after five years is necessarily dispositive if, indeed, Syncom has a vested right both to *require* Formula to allow it to participate in the financing of the station and to *convert* the warrants into common stock, in part, because there is no assurance that Formula will have the ability to later repurchase at market value. Further evidentiary hearing, as well as findings of fact and legal conclusions based thereon, are necessary to determine Syncom's rights and intentions with respect to a future ownership interest in Formula. We therefore direct the parties to revisit the vital question of Syncom's current legal rights (based upon appropriate principles of contract law); and, if necessary, to address the consequent question of whether an ownership integration plan which may well not exceed the inaugural license term is fully creditable under the Commission's comparative tenets or whether it should be diminished.

10. *Anderson Commitment.* Our final area of concern involves the integration proposal of Washington Television, Inc. The ALJ found that applicant entitled to 70.1% full-time quantitative integration credit for the proposed management participation of Dr. Joann Anderson, a 53.6% shareholder, and of Lonnie Murray, a 16.5% owner.[10] Dr. Anderson pledges to work as the station's general

[8] We also note that if it is determined that Syncom has a true vested interest in the applicant, Syncom's other mass media ownership interests might also be attributable to WSCT-TV.

[9] An option, or in this case a warrant, creates substantial uncertainty as to the ultimate ownership structure of an applicant and is therefore taken into account in determining an applicant's ownership structure, *i.e.*, the applicant's integration structure may be comparatively evaluated in its most unfavorable light. *See Radio Laredo, Inc.*, 87 FCC 2d 364, 376 (ALJ 1980), *aff'd Radio Laredo, Inc.*, *supra*.

[10] Only WSCT-TV and WCTO were awarded more quantitative integration credit than Washington Television, Inc., and the ALJ questioned the validity of two (20%) of WCTO's proposed integrated principals.

manager; but, virtually all of the competing applicants except to the integration credit awarded for Dr. Anderson's proposed integration, contending that her proposal should have been rejected because she failed to effectuate an integration pledge previously made to the Commission. Specifically, they invoke a 1974 application for a new FM station at Tallahassee, Florida filed by Amrad Corporation, wherein Dr. Anderson, a principal, was proposed as the full-time general manager of the facility. A competing application was filed, but the case was settled and Amrad's unopposed application was granted. Apparently, however, only one week after Amrad's grant, Dr. Anderson accepted a fellowship to pursue a graduate degree at Florida State, and she thereafter became a full-time student rather than the station's full-time general manager. She responds, though, that she did simultaneously work at the station on a part-time basis (on nights and weekends). The ALJ found that there was no evidence in the Commission's records that Dr. Anderson (or the station) ever notified the Commission of the change, *I.D.*, para. 109; nor does it appear that Dr. Anderson conditioned her prior full-time integration pledge on her potential academic schedule. Exceptors urge, in essence, that we recall the adage "once burnt, twice smart," and refuse to credit Dr. Anderson's latest integration proposal.

11. Inasmuch as this case must be remanded for other evidence, we believe that the above circumstances warrant additional inquiry to help determine whether Dr. Anderson's latest integration proposal should be accepted. The Commission, long ago, declared that it expects "the integration or principal participation representations made in the comparative hearing process to be discharged in good faith (with whatever revisions are felt necessary in light of changed circumstances)." *Tidewater Teleradio, Inc.*, 24 RR 653, 657 (1962). "Representations made to [the Commission] . . . are not to be put forth as a part of 'gamesmanship' or for tactical advantage: They must be seriously advanced and seriously regarded in actual operation." *Id.* Moreover, such representations cannot automatically be abandoned by a successful applicant upon the withdrawal of its competition. *Alexander S. Klein, Jr.*, 88 FCC 2d 583, 586–87 (1981). Here, the Board cannot determine on the basis of this record whether Dr. Anderson has met the *Tidewater* test, the record being almost barren of evidence concerning the circumstances surrounding the acceptance of the fellowship by Dr. Anderson—particularly the extent of her foreknowledge of the matter. Thus, pertinent examination should be made of such factual questions as when Dr. Anderson applied for the fellowship, the likelihood of its grant, when she was first apprised of its grant, and whether the Commission was, in fact, timely informed of her decision not to effectuate her integration pledge.

12. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the presiding Administrative Law Judge for prepa-

ration of a Supplemental Initial Decision consistent with this *Memorandum Opinion and Order.*

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D–2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WASHINGTON'S CHRISTIAN TELEVISION OUTREACH, INC. Washington, D. C.	BC Docket No. 81–528 File No. BPCT-5042
CENTURY COMMUNICATIONS, INC. Washington, D. C.	BC Docket No. 81–529 File No. BPCT-800117KE
CAPITAL COMMUNICATIONS WASHINGTON, INC. Washington, D. C.	BC Docket No. 81–530 File No. BPCT-800118KF
GRANT BROADCASTING CORPORATION Washington, D. C.	BC Docket No. 81–533 File No. BPCT-800118KK
URBAN TELECOMMUNICATIONS CORPORATION Arlington, Virginia	BC Docket No. 81–536 File No. BPCT-800118KN
WASHINGTON TELEVISION, INC. Washington, D. C.	BC Docket No. 81–537 File No. BPCT-800118KO
WSCT-TV, INC. Washington, D. C.	BC Docket No. 81–538 File No. BPCT-800118KP
For Construction Permit for New UHF Television Broadcast Station	

Appearances

Joseph E. Dunne, III, *James Gammon*, and *Richard G. Gay* on behalf of Washington's Christian Television Outreach, Inc.; *Lewis I. Cohen*, *Morton L. Berfield*, and *Roy W. Boyce* on behalf of Century Communications, Inc.; *Benito Gaguine*, *Russell C. Balch*, and *Heidi P. Sanchez* on behalf of Capital Communications of Washington, Inc.;

Jonathan Ginsburg and *E. William Henry* on behalf of Grant Broadcasting Corporation; *Alfred C. Cordon, Dennis J. Kelly, Pat Silver* and *Mark S. Allen* on behalf of Urban Telecommunications Corporation;[1] *Steven C. Schaffer, Malcolm G. Stevenson*, and *Lawrence M. Miller* on behalf of Washington Television, Inc.; *Michael H. Rosenbloom* and *Richard H. Waysdorf* on behalf of WSCT-TV, Inc.; and *Allan Moskowitz* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: January 14, 1983 Released: January 24, 1983)

1. This proceeding was designated for hearing on July 31, 1981 by the Chief, Broadcast Bureau.[2] The following issues are considered in this decision:

1. To determine with respect to Century Communications, Inc.:

(a) the availability of additional funds over and above the $766,066 indicated; and

(b) whether in light of the evidence adduced the applicant is financially qualified.[3]

2. To determine with respect to Urban Telecommunications Corporation:

(a) whether it has $2,525,000 available for construction and operation of the proposed station;

(b) whether in light of the evidence adduced pursuant to issue (a), applicant is financially qualified.

3. To determine which of the proposals would best provide a fair, efficient and equitable distribution of television service.

4. To determine the effect of *Velez v. Divine*, Civil Action No. 81-1225 D.D.C. upon Capital Communications of Washington, Inc.'s basic and/or comparative qualifications to become a licensee.

5. To determine the circumstances surrounding Capital's failure to disclose the involvement of A. Diane Graham in *Velez v. Divine* in answers to interrogatories, and to determine the effect, if any, upon Capital's comparative standing.

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[1] Alfred C. Cordon and Dennis J. Kelly withdrew as Urban's lawyers on May 24, 1982. During part of the hearing sessions held on June 2 and 3, 1982 an officer of Urban, Pat Silver, represented Urban. On August 2, 1982, Mark S. Allen began appearing on Urban's behalf. Mr. Allen participated in the filing of proposed findings and conclusions and then on September 9, 1982, before reply findings were filed, he withdrew as Urban's counsel. Urban's reply findings were filed by Urban's only stockholder, Theodore M. White.

[2] *Hearing Designation Order*, BC 002820, released August 19, 1981, 46 Fed. Reg. 43737 (August 31, 1981).

[3] Originally this issue included an inquiry into Century's land costs and its construction and operation costs. In a *Memorandum Opinion and Order*, FCC 81M-4113, released December 31, 1981, at ¶ 24, summary decision was granted on those aspects of the issue.

6. To determine whether Lawrence Brailsford and Grant Broadcasting engaged in misrepresentation by failing to report Mr. Brailsford's bankruptcy and, if that is the case, to determine the effect on Grant Broadcasting's basic and/or comparative qualifications.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[4]

2. Preceding the hearing additional issues were designated against applicants who dismissed their applications before the hearing. See *Hearing Designation Order*, BC 002820, released August 19, 1981, at 15 (Issues 2, 3, 4); *Memorandum Opinion and Order*, FCC 81M-4113, released December 31, 1981, at 13 (Issues 9, 10, 11, 12). These issues have not been resolved because of the dismissals. See *Order*, FCC 82M-0600, released February 24, 1982 (dismissing applications of Community Service Broadcasters, Inc. and Metropolitan Television, Inc.) and *Order* FCC 82M-0955, released March 24, 1982 (dismissing applications of Focus Broadcasting, Inc., Kent of Washington, Inc., and Television Communications, Inc.).

3. Prehearing conferences were held on October 22, 1981 (Tr. 1–32), January 8 (Tr. 33–62) and May 5, 1982 (Tr. 2589–2626). Hearing sessions were held on March 22 - April 2, 1982 (Tr. 63–2588) and June 2–3, 1982 (Tr. 2627–2947). The record was closed on July 19, 1982. *Order*, FCC 82M-2186, released July 19, 1982.

4. On August 2, 1982, all the competing applicants but Grant Broadcasting filed proposed findings of fact and conclusions of law on their own proposals.[5] On September 9, 1982, the competing applicants submitted proposed findings of fact and conclusions of law about one another's proposals. Reply findings were filed on September 30, 1982 by all parties. The Broadcast Bureau withdrew from participation in the case on July 27, 1982 and consequently it submitted no proposed findings or conclusions of law.

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[4] The *Hearing Designation Order*, BC 002820, released August 19, 1982, at 15, designated an issue (No. 6) questioning the financial qualifications of Washington Television, Inc. Summary decision was granted on that issue. *Memorandum Opinion and Order*, FCC 81M-4113, released December 31, 1981, at 8, 12. In addition, an unresolved character issue in *Gemini Broadcasting Company*, Dkt. BC 81–381–387, against Grant Broadcasting Corporation's principal, Milton Grant, was considered pursuant to the Commission policy enunciated in *Allegan County Broadcasters*, 83 F.C.C. 2d 371, 373 (1980) and resolved in Grant's favor. *Memorandum Opinion and Order*, FCC 82M-2601, released August 26, 1982 (denying the Broadcast Bureau's request to enlarge the issues to consider the *Gemini* issue involving Grant.)

[5] Grant Broadcasting filed on August 3, 1982 and has requested leave to file out of time. Grant has submitted good cause for its request and no opposition has been received. Thus, its findings and conclusions will be accepted.

FINDINGS OF FACT

Qualifying Issues

5. *Century's Financial Proposal (Issue 1)*: The cost for Century to construct and operate for three months has been determined to be $1,692,017. The Broadcast Bureau found that Century had available $766,066, leaving an unestablished balance of $925,951. Century relies on bond subscriptions from three of its stockholders to provide these funds. Pauline Wechsler would provide $600,000, Dr. Everett J. Gordon, $300,000, and Dr. Herbert M. Wechsler, $300,000. Century Exh. 5, at 1.

6. Pauline Wechsler supports her commitment with a balance sheet showing net assets of $19,008,137 and net liquid assets of $1,351,507. Century Exh. 5, Attachment 4. Dr. Gordon supports his commitment with a loan for $300,000 from the United Bank and Trust Company of Maryland. Century Exh. 5, Attachment 5, 6. Herbert Wechsler has supported his commitment with a balance sheet showing net assets of $5,518,618.22 and net liquid assets of $871,914. Century Exh. 5, Attachment 7.

7. *Urban's Financial Qualifications (Issue 2)*: In August 1981, when these applications were designated for hearing, Urban Telecommunications Corporation estimated its costs at $2,525,000. Urban relied on a $4,000,000 loan from Sefel J. and Associates, Ltd. The Broadcast Bureau concluded that since the lender was not an equipment manufacturer or a financial institution, it was necessary for Urban to submit a balance sheet for its lender. *Designation Order*, at ¶ 26. The loan was also found by the Bureau to be faulty because it was conditioned on Urban's pending STV authorization and contained a 30 day backout clause. *Id.* The Bureau concluded that the loan from Sefel J. and Associates was indefinite, that it did not state its terms, and that it was unreasonable for Urban to rely on it. *Id.*

8. Urban did not amend its financial showing until March 15, 1982, nearly a week after the written case was due in this proceeding and two days before the parties designated the witnesses they wanted to cross-examine. In the proposed amendment, Urban reported that until the first week of March it had been unable to find financing. Then it found the Ideal Opportunities Corp., Miami Beach, Florida, "which expressed interest in Urban's objectives" and "expressed its willingness to loan Urban $1,250,000."[6] In addition, Urban stated in its petition that in the first week of March, it had obtained a letter from the National Bank of Commerce, Washington, D.C. "concerning a loan for $1,000,000."

9. With the hearing scheduled to begin on Monday, March 22,

[6] Petition for Leave to Amend, filed March 15, 1982, by Urban Telecommunications Corporation, at 2.

1982, Washington Television, Inc. filed on Friday, March 19, 1982 an opposition to Urban's petition for leave to amend. Urban also sought a protective order to prevent the authors of its last minute filed financial documents from having to appear for cross-examination. Washington Television, Inc. also opposed Urban's request for a protective order. Washington Television, Inc. urged rejection of Urban's amendment because there was no showing that the Ideal Opportunities Corp. was either a financial institution or an equipment manufacturer and Urban had not supplied any financial statement or balance sheet. Washington Television pointed out that this was the second time that Urban had ignored this requirement. Washington Television also pointed out that the terms of the loan were so extraordinarily favorable that the agreement did not appear to have resulted from an arms length transaction. In addition, Washington Television urged that the letter from Ideal Opportunities was ambiguous about what security would be required.

10. Washington Television also urged that the letter from the National Bank of Commerce was deficient because it stated no more than the bank's confirmation that it had an "interest in providing a loan." Washington Television maintained that this letter too, like an earlier Urban bank letter, was indefinite about terms of repayment, covenants, and personal guarantees. And Washington Television noted that the National Bank of Commerce could not legally lend the amount stated in the letter.

11. In addition, Washington Television argued that questions were raised about whether the stock and assets of Urban could be pledged to two different lenders. This was particularly troublesome since Urban proposed to lease all items that might ordinarily be available as collateral.

12. On the first day of the hearing these matters were resolved. Urban was directed to produce the authors of its lending letters for cross-examination and the proffered financial showing amendment was accepted. Tr. 69–72; *Order*, FCC 82M-0953, released March 30, 1982. At that time, Urban pointed out that it additionally relied on a letter from Amvest Leasing and Capital Corp. promising to lease Urban its equipment. Urban was directed to give some assurance that Amvest was qualified as a financial institution or an equipment manufacturer, or if it did not, it would have to establish Amvest's ability to provide the equipment. Tr. 70–71. Urban stated it would provide such assurance. Tr. 70.

13. Later, Urban urged that Amvest was a "recognized lessor of broadcast equipment" and that official notice should be taken that Washington's Christian Television Outreach (WCTO) had relied on equipment from Amvest Leasing and that the Broadcast Bureau had not designated a financial issue against that applicant. Tr. 189–90. Urban claimed that the Bureau's action in the case of WCTO

demonstrated the validity of its claim that it need not establish the ability of Amvest to supply Urban with equipment.

14. It was pointed out to Urban that the application form made no exception to the financial showing requirement for equipment lessors and that the Bureau's designation order was silent about the reason for finding WCTO financially qualified. Tr. 190. Urban stated that it would provide a memorandum establishing that lessors were treated like financial institutions. On March 23, 1982, Urban submitted a memorandum which purported to demonstrate that leasing entities need not demonstrate their ability to supply the equipment being leased. The memorandum relied on the Commission's holding in the hearing designation order in *Merrimack Valley Broadcasting, Inc.*, FCC 80-50, released February 13, 1980. In that order the Commission held that equipment suppliers need no longer demonstrate that they had examined and approved the credit worthiness of an applicant. The issue in this case is quite different: It is not the credit worthiness of the applicant that is uncertain but the ability of the lender to lend. There has been no demonstration that Amvest is capable of providing the equipment and it has not been established that Amvest is an equipment manufacturer. Moreover, the only standard available to measure its ability is that provided in the instructions to Form 301.

15. The need for an Amvest witness was underscored by uncertainties which developed during the testimony of Urban's President, Theodore White, concerning the nature and terms of the Amvest proposal. Tr. 2306–17. In view of the lack of such a witness, that portion of Urban's Exhibit No. 3 concerning the proposed Amvest lease and Exhibit 9 were rejected. Tr. 2384–85. Nonetheless, it was indicated that Urban might be permitted to present a representative of Amvest as a witness upon request if there was not too great a delay in such presentation. Tr. 2387.

16. The hearing sessions during which Urban presented its case ended on April 2, 1982. Additional hearing sessions concerning issues added with respect to other applicants were held on June 2 and 3, 1982. On July 7, 1982, Urban filed a Petition to Reopen the Record proposing an examination by telephone of a representative of Amvest on July 8 or 9, 1982. Urban's proposal was denied because it was too late and so indefinite and incomplete that it did not justify the disruption which approval would cause. *Order*, FCC 82M-2186, released July 19, 1982.

17. While the hearing was going on Urban elected not to rely on the financing of the Ideal Opportunities Corp. It did, however, attempt to demonstrate that the National Bank of Commerce had given reasonable assurance that it would lend Urban $1,000,000. Urban Exh. 3, at 2.

18. Urban relies on the net proceeds of $922,916.67 from the National Bank of Commerce (NBC) loan. Jeffrey N. Cohen, Chair-

man of the Board of Directors of NBC, testified at the hearing concerning the proposed loan. Tr. 2120–83. Although the NBC letter is worded as if NBC will be the sole source of the loan, Mr. Cohen testified that NBC is limited by law to loans of no more than approximately $490,000 to any one entity for one purpose. Tr. 2131. He stated that other entities would have to participate with NBC to make the proposed loan and that those other entities would probably be banks. Tr. 2131. He testified further that such other banks could be any one of, or a combination of, Equitable in Baltimore, Maryland, Old Stone Bank in Providence, Rhode Island, and the National Bank of North America in New York. Tr. 2131–32.

19. Mr. Cohen stated that another bank would make an independent evaluation as to whether to advance funds towards any proposed loan in which it is asked to participate (Tr. 2132, 2133), and that banks have varying standards with respect to evaluation of loan requests. Tr. 2130, 2133. The three banks named by Mr. Cohen have a regular correspondent relationship with NBC (Tr. 2131), but there is no requirement that correspondent banks accommodate each other with respect to particular proposed loan transactions. Tr. 2133–34. Mr. Cohen has not spoken to anyone at the Equitable Bank or at the National Bank of North America concerning their possible participation in a loan to Urban. Tr. 2135. He has spoken about the possibility, for approximately ten minutes during a telephone call involving other topics, to a senior loan officer at Old Stone Bank. None of the written information provided by Urban to NBC (Tr. 2176) was sent to Old Stone Bank. Tr. 2135, 2178. However, Mr. Cohen may have told Old Stone Bank that Urban would operate Channel 14 as an STV station, because he was under the impression that that was the case. Tr. 2136–37, 2164.

20. Mr. Cohen was also questioned concerning the terms and conditions of the proposed loan. He testified that there might well be a facility fee charged in connection with the loan, were it made. Such a fee would consist of "points" representing a charge which could range from 1% of the total amount of the loan ($10,000) to 7% of the amount of the loan ($70,000), with various possibilities as to amount and method of payment required. Tr. 2137–40. He testified that there might be a requirement that Urban maintain "compensating balances," but representatives of Urban did not ask for an explanation of what this requirement might entail and no such explanation was provided, inasmuch as information as to the likely implementation of that possible requirement is not now known. Tr. 2156–57.

21. *Applicability of Section 307(b) as to Fair, Efficient, and Equitable Distribution of Television Service (Issue 3)*: Urban submitted a proposed hearing exhibit (Urban Exh. 4) to establish the Section 307(b) merit of its proposal for Arlington, Virginia. That exhibit was rejected. Tr. 2243. The presiding officer (as well as the competing applicants) devoted considerable time at the hearing to a

testing of the evidentiary shortcomings of the exhibit, and the possibility of reforming the exhibit to overcome those shortcomings. Tr. 2193–2244. This discussion included an extended colloquy between counsel to Urban and the presiding officer concerning the details of how to reform the exhibit and to make it probative. Tr. 2224–42. The Judge offered Urban an opportunity to prepare a substitute Urban Exhibit No. 4 to cure the problems. Tr. 2371–72. Counsel to Urban stated in this regard that: "I think at this point, Your Honor, I can represent that we'll try to put another exhibit in." Tr. 2372. Nonetheless, despite the invitation and acceptance, Urban never tendered a substitute Exhibit 4.[7]

22. A document prepared by Urban and given to at least one of its proposed financial backers was entered into evidence. Tr. 2126, 2277; WTI Exh. 9. Mr. White, President of Urban, testified that he had prepared the document in conjunction with his law firm. Tr. 2276. The memo is titled "Memo re: UHF Commercial Television in the Arlington, Virginia/Washington, D.C. Area," and it states that:

> The Arlington, Virginia (Washington, D. C.) television market consists of the greater metropolitan Washington area, all of southern Maryland, all of western Maryland, (except for Garrett County), all of Virginia north of the Rappahannock River (plus Fredericksburg and Spotsylvania County), the five northeasternmost counties of West Virginia, and Franklin County, Pennsylvania (Chambersburg). This market, defined by the national television market research firms (here, Arbitron), is ranked number 8 in the United States, out of over 210 such markets. In relation to its size, this market probably has the fewest number of local television stations in the nation.

WTI Exh. 9, at 1. The memo further states "There is a need for an additional television station in the Washington market, and, if done successfully, this can well be a lucrative venture." WTI Exh. 9, at 3. Other portions of the memo include a map of the proposed contour of the station (WTI Exh. 9, at 6) and a page entitled "Future Value of an Independent UHF Station in Washington." WTI Exh. 9 at 8. Mr. White confirmed, when questioned, that the revenue projections contained in the memorandum he had prepared included anticipated revenues from the entire Washington, D. C. metropolitan area. Tr. 2284.

23. *Capital Communications' Diane Graham's Violation of Title VII of the Civil Rights Act (Issue 4)*: Diane Graham, who is proposed for a part-time management position in Capital Communications, and is its President and a 12.5 percent shareholder, was found by the U. S. District Court for the District of Columbia to have discriminated, on the basis of sex, in hiring the Director of the Hispanic

[7] An exhibit in the nature of a rebuttal to Urban's 307(b) argument was prepared by the Washington, D. C. applicants for Channel 14, and the exhibit was identified at the hearing as WSCT Exhibit No. 25. Tr. 1630. Because of Urban's failure to meet the burden of going forward and establishing the issue, the Washington, D. C. applicants never offered the exhibit into evidence.

Employment Program, Office of Personnel Management. *Velez v. Devine*, No. 81–1225 (D.C. Feb. 9, 1982). WCTO Exh. 13. Ms. Graham is Assistant Director of the United States Office of Personnel Management for Affirmative Action Programs. CapCom Exh. 9, at 1; Tr. 847. It was Ms. Graham's function, as supervisor, to select one of the persons on a list of qualified applicants for the position of Director of the Hispanic Employment Program. Tr. 2805–06, 2810. Her failure to select Roceliz Velez for the position was found by the United States District Court for the District of Columbia to have violated Title VII of the Civil Rights Act of 1964. The Court held that Ms. Graham did not select Ms. Velez because she is a female. Ms. Graham testified at the trial held on the Velez complaint and the Court, in summarizing her testimony about the hiring of a male candidate over a female, stated that:

> . . . Ms. Graham's testimony therefore is not only insubstantial, it contains contradictions and inconsistencies with other evidence given at various times as to her reasons for not promoting Ms. Velez and, viewing it as a whole, the Court finds that it is not entitled to any weight. WCTO Exh. 13, Slip Op. at 5.

24. The Court continued:

> Finally, Ms. Velez was clearly better qualified than the male eventually selected for the Director's vacancy and at least as well qualified as the two other males to whom the job was offered. Thus, the Court must also reject as pretextual Ms. Graham's claim that Ms. Velez was not as well qualified as those offered the position. *Id.* Slip Op. at 6.

25. Ms. Velez was awarded back pay, ordered reinstated to the grade and step that she would have received had she occupied the position, and granted attorneys' fees and costs. *Id.*

26. While, as already pointed out, Ms. Graham testified in the trial of *Velez v. Devine* and sat through the trial as the government's representative, during the investigation she was not consulted "other than as a person answering questions." Tr. 2821. She made particular note in her testimony that she had no control over the government defense of her action.

27. She has participated in more than 40 hiring decisions during her years in government, and the *Velez* case is the only challenge that has been made to any of those decisions. Tr. 2799–2800. In her present position, which she has held since 1979, she has made approximately 30 promotions and 30–32 hires. Tr. 2802. During that time the staff she has supervised has increased from 63 percent women to 65–66 percent. Tr. 2800, 2803, 2844. These figures compare to only 37 percent employment of women in the government as a whole. The professional staff (Grades 12 and 13) is 66 percent women as compared to only 11 percent for the government as a whole. Tr. 2803. For managerial grades 14 and 15, the figure for the government as a whole is 5.7 percent while in Ms. Graham's office it is 50

percent. Tr. 2803. Promotions by Ms. Graham have followed a similar pattern. Tr. 2804.

28. Four witnesses testified that they knew Ms. Graham has a commitment to non-discrimination in employment: Ruth Bates Harris, Hedwig Oswald, Dolores de la Torre Bastning, and Francesca Farmer. Each of these women has a long standing record of working against discrimination in employment. They testified that Ms. Graham, in their view, does not discriminate against women and, to the contrary, that she has exhibited a professional interest in promoting women. Tr. 2768, 2778–81, 2786–91, 2853–67, 2880–85, 2891.

29. *Grant Broadcasting's Failure to Reveal Lawrence Brailsford's Bankruptcy (Issue 6)*: Lawrence Brailsford, who is a 25 percent stockholder/subscriber of Grant (one of only three), a Director, Vice President, and proposed part-time Public Affairs Director, in July 1981, filed for bankruptcy personally and for a corporation, Community Development, Inc., which he owns. There is also a pending suit against him regarding his bankruptcy. In September of 1981, Mr. Brailsford informed the bankruptcy court that his liabilities exceeded his assets. He did not report to the Commission his bankruptcy or the lawsuit against him when they occurred, nor did he reveal it when he was asked about such legal action in interrogatories in November 1981. Furthermore, on November 19, 1981, in response to a petition to enlarge about Grant's finances, Mr. Brailsford appeared to state that he was still able to meet the purchase price of $27,150 for his stock. See *Memorandum Opinion and Order*, 82M-1143, released April 9, 1982. The issue centers on whether Brailsford deliberately sought to conceal his bankruptcy because it would have raised questions about his ability to participate in Grant's application. His role is both quantitatively and qualitatively important. If he purchases his stock, he would own a significant share of the company and his role enhances Grant's application because he is black and lives in Washington, D. C.

30. In July 1980, when Mr. Brailsford submitted his first balance sheet to the Commission, he represented that he had $27,150 in cash on hand to meet his stock subscription. Century Exh. 37. Prior to this filing Mr. Brailsford met with Grant's two other stockholders, Milton Grant and Theodore R. Hagans, at Mr. Brailsford's home. He remembered that Mr. Grant stated that it was necessary that the reputation of participants in the application be impeccable. Tr. 2639–40. Mr. Grant testified that he also remembered the meeting and he recalled telling Mr. Brailsford that the application was already on file and that it was necessary to keep the Commission informed of significant changes. Tr. 2898, 2908. The necessity of keeping the Commission informed was also the primary topic at other meetings, Grant maintained. Tr. 2898.

31. Mr. Brailsford said there was no such discussion (Tr. 2639)

and that Grant had not told him the application was already on file. Tr. 2657. However, Mr. Brailsford agreed that at a third meeting held before he became a part of the application, Grant did tell him the importance of keeping the application current. Tr. 2642. Grant stated that it was also mentioned then and at all four meetings held. Tr. 2898, 2899, 2900. Brailsford said he did not remember the requirement from mid-1980 until mid-March 1982 when he was preparing for the hearing. Tr. 2652.

32. Mr. Brailsford said that he did not inform Mr. Grant or Grant Broadcasting's counsel of his bankruptcy because of preoccupation with other "pressing issues." Tr. 2649. However, he did tell Mr. Hagans, who is Grant's only other stockholder and a 25 percent owner. Tr. 2664, 2682.

33. When Grant Broadcasting submitted its November 18, 1982 responses to the interrogatories it did not supply information about the suit against Brailsford or his bankruptcy. Tr. 2911–14. Mr. Brailsford maintains that the interrogatories had not been discussed with him. Tr. 2688. Milton Grant testified that he had relied on his counsel's communication with Mr. Brailsford for the accuracy of Grant's responses involving Mr. Brailsford. Tr. 2915. He stated that when he went over the answers with his counsel, his counsel indicated that he had reviewed the responses with Mr. Brailsford. Tr. 2913–16.

34. At the same time Mr. Brailsford wrote Mr. Grant a letter which was included as part of a response to a petition to enlarge. Mr. Brailsford stated in the letter that he not only had the $27,150 reflected on his balance sheet already submitted to the Commission but that his net assets "above and beyond all long and short term liabilities" exceeded $15,000. Century Exh. 35. He also began the letter by noting that the commitment was both his and his wife's. *Id.* He included his wife, he stated, because, although she was not part of the application, he was financially incapable of meeting the obligation by himself. Tr. 2649–51. Mr. Brailsford claimed that he consulted Grant's counsel about his capability. Tr. 2668. The letter, which was originally drafted by counsel, was altered by Brailsford to include his wife in his commitment but he did not change the statement about his cash on hand, although he did not have the cash. Tr. 2678–79.

35. During the period Mr. Brailsford prepared the letter about his finances and the interrogatories were being answered, Mr. Brailsford spoke on the telephone with Mr. Grant at least twice. Tr. 2690–91, 2717. And, although he told Grant's former counsel about his bankruptcy in August or September 1981 (Tr. 2709), Mr. Brailsford initially maintained that he did not tell his current counsel about his bankruptcy when the letter about his finances was being prepared in November 1981. Tr. 2666. After a recess in the hearing he said that he had told his counsel in November and then

on redirect he maintained that he had not. Tr. 2681–82; 2720. Mr. Brailsford's testimony also reflects the same pattern of inconsistency when he was asked whether he had told Mr. Grant. Tr. 2667, 2681–82. Mr. Brailsford did say he was aware that the letter about his finances was intended for the Commission. Tr. 2687.

36. The inconsistency of Mr. Brailsford's testimony is highlighted by his detailed explanation of how he told Mr. Grant of his bankruptcy and financial problems in November 1981 and his total recant on redirect. Milton Grant's testimony is unequivocable that Brailsford did not tell him about the bankruptcy until March 1982. Mr. Grant also stated that his former counsel never told him that Mr. Brailsford had informed him of the bankruptcy. Tr. 2908–11, 2921–26.

Comparative Issues

Diversification of Ownership and Control of Mass Communications Media

37. Neither *Washington's Christian Television Outreach, Inc.*, nor any of its officers or directors, holds an ownership interest in or has any connection with any media of mass communications. WCTO Exh. 1, at 2. *Century Communications, Inc.* and its principals have no cognizable interest in any media of mass communications.[8] Century Exh. 2, at 1; Exh. 3, at 1–2; Exh. 4, at 2; Exh. 6, at 1; Exh. 7, at 2; Exh. 8, at 1; Exh. 11, at 2; and Exh. 13, at 2. Neither *Capital Communications of Washington, Inc.*, nor any of its stockholders, holds any interest in any media of mass communications.[9] Capital Exh. 2.

38. *Grant Broadcasting Corporation* does not hold any other mass media interest. Theodore R. Hagans, who is a director and 25 percent owner of Grant Broadcasting, is a 13 percent stockholder and a director of Washington Community Broadcasting Co., the licensee of WYCB(AM), Washington, D. C. He will divest this interest if a grant is made. Grant Exh. 2, at 1–2. Milton Grant, who is Chairman of the Board, Director and 50 percent owner of Grant Broadcasting, holds options to acquire 5 percent of Channel 21, Inc.,

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[8] Century stockholders and principals, Steven Wechsler, Pauline Wechsler, Peter Yeskel, and Diane Wechsler are stockholders and principals of Marquee Television Network, Inc. which operates a pay television service distributed by microwave in Washington, D. C. They propose to divest themselves of their shares if a grant is made to Century. Century Exh. 2, at 1–2; Exh. 3, at 3; Exh. 4, at 2; Exh. 6, at 1. Everett J. Gordon has 5 percent ownership interests as a limited partner in the following cable television companies: CATV Harrington Company (Harrington, Delaware); CATV Sussex Company (Sussex, Delaware); and CATV La Plata Company (La Plata, Maryland). He will divest these interests if a grant is made to Century. Century Exh. 9, at 3.

[9] Thelma J. Mullin's husband owns 5 percent of the stock of WJDY, a daytime-only AM station in Salisbury, Maryland and is a 1.26 percent stockholder of KSTS-TV, San Jose, California. Ms. Mullin is a capital stockholder and principal.

the licensee of KTXA-TV, Fort Worth, Texas. His option may be exercised after April 1, 1984, provided Grant is still employed at the station. Mr. Grant will also hold 21/2 percent of Channel 20 Enterprises, which is about to become the permittee of KTXH-TV, Houston, Texas. In addition, when the joint venture of Channel 20 Enterprises is executed, Grant will hold an option to acquire a 5 percent share. Grant Broadcasting has not indicated what conditions, if any, may apply to the 5 percent interest.[10]

39. Milton Grant is also a 50.9 percent shareholder in Grant Broadcasting of Little Rock which has the right to acquire within one year from June 28, 1982, a 25 percent limited partnership in LRTV Limited Partnership, which holds a construction permit for Channel 16, Little Rock, Arkansas. The option is conditioned on Grant Broadcasting of Little Rock obtaining favorable final Commission or Commission staff action on its qualifications.[11] Grant Exh. 2, at 2–3.

40. *Urban Telecommunications Corporation* holds no other mass media interests. Theodore White, who is Urban's sole stockholder, President and Treasurer, is the 75 percent stockholder, President and Director of Page Broadcasting Corporation. Urban Exh. 6. Page E. Silver, who is Urban's Vice President and Secretary, is Vice President, Director and 25 percent stockholder in Page Broadcasting. *Id.* Page Broadcasting is an applicant for a construction permit for a new television broadcast station which would operate on Channel 30, Nashville, Tennessee. *Id.* Page Broadcasting agreed to settle the Nashville proceeding in exchange for expenses and the right to purchase 5 percent of the permittee, Television Corporation of Tennessee. *Memorandum Opinion and Order*, FCC 82M-3943, released December 10, 1982 (per ALJ Joseph Stirmer), at ¶3. The stock was to be issued to Page after final FCC approval. See Docket No. 81–684, Hearing Session held November 17, 1982, at Tr. 184. Theodore White is also an applicant for a low power television station at Charlottesville, Virginia. Urban Exh. 6.

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[10] Grant's interest in Channel 20 Enterprises was only revealed after the Commission approved the assignment of the permit. See *Order*, FCC 82M-3669, released November 19, 1982, granting Motion for Leave to Amend, filed October 18, 1982 by Grant. Before the agreement is executed Grant continues to hold only an option to acquire a 21/2 percent interest in Channel 20, Inc. This option is subject to the same condition as the option to acquire an interest in Channel 21, Inc.

[11] Grant has not explained whether the condition has been satisfied or whether Grant Broadcasting of Little Rock intends to exercise the option. On August 26, 1982, in response to a Broadcast Bureau petition, the qualifying issues raised against Grant Broadcasting of Little Rock were considered in this proceeding and were found to be insufficient to affect Milton Grant's qualifications in this proceeding. *Memorandum Opinion and Order*, FCC 82M-2601, released August 26, 1982. Grant's subsequent pleadings do not state whether this satisfies the prohibition on Grant Broadcasting of Little Rock acquiring an interest in the Little Rock facility.

41. *Washington Television, Inc.*'s principal, Lonnie Murray, is the 13 percent owner of Radio Vanderbilt, Inc., licensee of WWIW(AM), New Orleans, Louisiana. WTI Exh. 1A, at 4. He participates in the operation of the station through a personal consulting and non-competition agreement with Radio Vanderbilt, which expires in June of 1984. *Id.* In recent years this agreement has required 5 hours or less of his time. Tr. 2425. John F. X. Browne holds less than 1 percent of the stock of Michigan Television Network, Inc., the licensee of WGTU(TV), Traverse City, Michigan and Satellite WGTO(TV), Sault Ste. Marie, Michigan. The other principals of Washington Television have no other interests in any media of mass communications.[12] WTI Exh. 1A, at 5; WTI Exh. 2, at 3; Tr. 2496.

42. *WSCT, Inc.* is wholly owned by Formula Telecommunications, Inc. Lewis A. Rivlin, a Formula stockholder, holds a 25 percent interest in Coaxial Systems, Inc. which has a 10% interest in Public Cable of Portland, Maine, the operator of Portland's cable television system. WSCT Exh. 2. Coaxial also has an 8.75 percent interest in cable television systems in Laurens and Clinton, South Carolina. *Id.* Portland is located 482 miles from Washington.[13] Armando B. Rendon, who is also a Formula principal, is a 10% stockholder in Los Cerezos Television Company, which is the licensee of an experimental television broadcast translator on Channel 56, Washington, D. C. WSCT Exh. 2, at 1. Tr. 1911. Mr. Rendon has stated he will divest if a construction permit is granted. WSCT Exh. 2.

Best Practicable Service to the Public—Integration of Ownership and Management.

43. *Washington's Christian Television Outreach, Inc.*: WCTO is a non-profit, non-stock D.C. corporation. WCTO is controlled by a board of directors which, in turn, elects the operating officers of the corporation. Corporate decisions are made in accordance with a majority vote of the Board of Directors. WCTO Exh. 1, at 1; Century Exh. 29, at 2. Its incorporators and original Board of Directors were A. Bert Carver, Dr. Wendell P. Witten and Dr. Lucas Blevins. Century Exh. 28, at 3. Seven additional members were added to the Board in 1980 to bring the total number of members to 10. WSCT Exh. 18, at 3. The directors of WCTO are elected to the Board of Directors for a two-year term and are eligible for reelection. The officers and directors of WCTO are:

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[12] Louis Schwartz and Robert A. Woods, whose law firm, Schwartz, Woods & Miller, is a Washington Television stockholder, each holds 25 percent of the stock of Multi-Video, Inc., a corporation which holds 50 percent of the stock of Term-Comm, the licensee of MDS microwave station WQR23, Terre Haute, Indiana. WTI Exh. 1A, at 5.

[13] Pursuant to WSCT-TV's request, official notice is taken of these distances.

August Bert Carver	President, Director
Dr. Wendell P. Witten	Vice-President, Director
Dr. Lucas H. Blevins	Secretary/Treasurer, Director
Julia F. Carver	Director
Elaine H. Witten	Director
Jean H. Blevins	Director
Charles R. Hayes	Director
Joe-Ann Hayes	Director
Raul Vasallo	Director
Emma Vasallo	Director

WCTO Exh. 1, at 1–2.

44. Although WCTO's corporate charter authorizes it to engage in the business of operating a television station, WCTO's purpose is primarily religious, i.e., "To bring greater glory to Almighty God by disseminating the Gospel of Jesus Christ and other truths of the Holy Bible by whatever means possible . . . ." Century Exh. 28, at 2. Each director of the corporation is required to make a written statement of faith "which the Board of Directors shall find not to be inconsistent with the purposes of this corporation." Century Exh. 29, at 1; Tr. 130. WCTO's bylaws provide that all prospective employees be informed of the purpose of the corporation, and "be qualified and willing to render service consistent therewith." Century Exh. 29, at 7; Tr. 148–50, 201.

45. WCTO's bylaws also require the directors to act to ensure that "no decision" in the selection or dismissal of employees be based on the person's age, sex, race, religious affiliation or nationality background (Century Exh. 29, at 7; Tr. 200) and a person's religious beliefs would not disqualify a person from working for WCTO's station. Tr. 173, 201. WCTO's president, Bert Carver, explained the intent of these provisions as: "We've clearly proposed a station with a Christian format, and I would assume if they [prospective employees] made application that they would be aware of that. However, to remove all doubt, they will so be advised as to our programming format and purposes. And if they are qualified to do the job, and want the job, they'll get the job." Tr. 201. WCTO's bylaws also provide that the selection of persons to benefit from WCTO's corporate, educational, or charitable programs shall not be affected by a person's age, sex, race, religious affiliation, skin color, nationality, or employment. Century Exh. 29, at 7.

46. Eight of WCTO's ten directors propose to play an active part on a day-to-day basis in station management and all eight directors propose to work full time (at least 40 hours per week) at WCTO's proposed station. WCTO Exh. 1, at 2–6. Those directors, and the positions they propose to occupy at the station are:

August Bert Carver	General Manager	WCTO Exh. 1, at 2
Dr. Wendell P. Witten	Program Production Manager	WCTO Exh. 1, at 4
Dr. Lucas H. Blevins	Counseling Manager	WCTO Exh. 1, at 3
Julia F. Carver	Marketing Director	WCTO Exh. 1, at 3

Elaine H. Witten	Program Manager	WCTO Exh. 1, at 5
Jean H. Blevins	Counseling Manager	WCTO Exh. 1, at 4
Rev. Charles R. Hayes	Public Relations Director	WCTO Exh. 1, at 5
Joe-Ann Hayes	News Director	WCTO Exh. 1, at 6.

47. Bert Carver, WCTO's President, proposes to work full time (40 hours per week) as General Manager of WCTO's proposed station. WCTO Exh. 1, at 2. As General Manager, Mr. Carver would be responsible for the overall operation of the TV station and its relation to the community. He will be responsible for the planning of the goals, objectives, and operating procedures of the station. Mr. Carver would also be responsible, generally, for evaluation of station facilities and equipment, ensuring WCTO's compliance with FCC rules and regulations, the development of variations needed in individual and overall program formats, development of changes in rate structure on selling methods and revision of office procedures. WCTO Exh. 1 at 2–3. The various departments which would report to Mr. Carver include news, marketing, local production, programming, operations and financial. Tr. 145. Mr. Carver may also make limited appearances on the air, if necessary. Tr. 145. As General Manager, Mr. Carver will, with the concurrence of the Board of Directors, hire and fire employees. Tr. 145–46. Mr. Carver expects to be a paid employee of WCTO (Tr. 157, 159) but the specific amount has not been discussed by WCTO's Board of Directors (Tr. 156, 159), no specific salary has been set. Tr. 140, 159.

48. Mr. Carver's heritage is part Cherokee Indian (Native American). WCTO Exh. 2, at 1. Mr. Carver's mother had both an Indian mother and father. Since 1954, he has been employed by the Johns Hopkins University Applied Physics Laboratory (APL) in Laurel, Maryland. WCTO Exh. 2, at 2. Mr. Carver will quit his present job to work full time for WCTO. WCTO Exh. 2, at 4. From 1955 to 1957 Mr. Carver lived in Chevy Chase, Maryland, and since late 1957 he has lived in Wheaton, Maryland. WCTO Exh. 2, at 3.

49. In addition to his full-time employment with APL, Mr. Carver is the joint owner, with his wife, of a broadcast tower in Wheaton, Maryland, doing business as the High Tower Company (WCTO Exh. 2, at 3), which leases tower space to approximately nine entities. Tr. 136–37. Mr. Carver devotes approximately seven or eight hours on a weekly basis to this business. Tr. 137. In addition, Mr. and Mrs. Carver own Action Radio, a company that provides UHF repeater coverage for business radio communications. WCTO Exh. 2, at 3. Action Radio does business with approximately 20 or 21 business radio customers and Mr. Carver devotes about seven to eight hours per week to that business. Tr. 137. Should WCTO be granted a construction permit, Mr. Carver anticipates continuing his interest in Action Radio and High Tower Company, which will consume no more than 15 hours per week of his time. WCTO Exh. 2, at 4; Tr. 136–37. Mr. Carver's other outside activities include

attending church at the Fourth Presbyterian Church, Bethesda, Maryland, and religious meetings, which consume no more than two to four hours per week. WCTO Exh. 2, at 4; Tr. 138. In addition, once or twice a year, Mr. Carver attends a special religious meeting for about two weeks which is normally incorporated into a family vacation. Tr. 138.

50. Beginning in 1971, Mr. Carver was asked to serve as TV coordinator for a local religious group (WCTO Exh. 7, at 3), and participated in the production of and hosted "God's Good News," a weekly religious television program broadcast on Channel 20, WDCA, Washington, D.C. until 1976. WCTO Exh. 2, at 3; Tr. 140–41. In 1976, Mr. Carver and WCTO took part in the production of "God's Great News," a weekly religious television program broadcast on Channel 20, WDCA, Washington, D.C., until the program ceased production in September 1979. WCTO Exh. 2, at 3; Tr. 141. Mr. Carver served as a coordinator of the program, which involved advising the studio director what the group desired to be done. Tr. 166. These programs were normally broadcast at 11:00 p.m. on Sunday and at various times on Saturday morning (Tr. 141), and Mr. Carver hosted the program approximately a dozen times a year. Tr. 143. Mr. Carver has never been employed by any radio or television station or by any media of mass communications. Tr. 140. His work on these programs was as a volunteer and he continued until it took up too much personal time. Tr. 141, 144.

51. Dr. Wendell P. Witten is Vice President of WCTO, and has been a Director of WCTO since its incorporation in 1976. WCTO Exh. 3, at 3. Dr. Witten has committed to work full time (40 hours per week) at WCTO's proposed station as it Program Production Manager. WCTO Exh. 1, at 4; WCTO Exh. 3, at 3. WCTO submitted a general exhibit which stated that the Program Production Manager would bear the primary responsibility for producing the local portions of the station's program schedule, for appearing as talent or as the host for local programs, where appropriate, and for coordinating and obtaining guests and talent to fill local programming needs. WCTO Exh. 1, at 4; Tr. 220. Dr. Witten would host at least one local program (Tr. 221), "Washington," for which he will be responsible as director (Tr. 197) and assist in setting up the studio for local productions. Tr. 241. As WCTO's Program Production Manager, he will assist in supervising the technicians necessary for the production of local programming, and WCTO anticipates that as the station's operations expand, assistants will be hired under Dr. Witten to help with local programming and production. Dr. Witten will have direct responsibility for supervising the assistants. WCTO Exh. 1, at 4; Tr. 234.

52. Dr. Witten is a black male. He lived in Washington until February 1972, moving first to Falls Church, Virginia and then (in 1975) to his present address in Alexandria, Virgina. WCTO Exh. 8, at

1–2. He began practicing optometry in the northeast section of Washington in 1952 and he still practices optometry in downtown Washington. He has been self-employed since 1954. Tr. 210.

53. Dr. Witten will continue practicing optometry should WCTO receive a construction permit, but he will reduce his involvement in his practice to no more than 15 hours a week to fulfill his commitment to work full time at the station. WCTO Exh. 3, at 3; Tr. 225. He estimates that decreasing his hours of practice to 15 hours a week will reduce his current gross income some $15,000 or $20,000, and projects that his income for 15 hours per week of optometry will be $50,000 per year (Tr. 226), a drop from his current gross of $65,000 to $75,000 from his 40 hour-a-week practice. Tr. 236–37. Although Dr. Witten expects to receive a salary for working at the station (Tr. 225), no specific figure has been agreed upon. Tr. 225. There is, however, an agreement that all of the board members of WCTO will receive some compensation. Tr. 225. Dr. Witten served as a member of the Board of Examiners in Optometry for the District of Columbia from 1963 until June 1969, and during four years of that term he served as Vice President of the Board. WCTO Exh. 3, at 2.

54. In 1967, Dr. Witten joined the Full Gospel Businessmen's Fellowship International (FGBMFI), and became the co-founder, a charter member, and President of the Downtown D.C. Chapter in 1975. WCTO Exh. 3, at 2. Dr. Witten devotes approximately three hours a week to the FGBMFI organization. Dr. Witten is also the director of the Wendell and Elaine Witten Christian Foundation, a nonprofit foundation which funds Christian service work, but which is now inactive. WCTO Exh. 3, at 2; Tr. 215–16. Dr. Witten also participated in sponsoring a series of television programs broadcast on WDCA, Channel 20, Washington, D.C., beginning in 1971 and known as "God's Good News," and after 1977 as "God's Great News." WCTO Exh. 3, at 2. Dr. Witten sometimes co-hosted the "God's Great News" programs for approximately two years in the middle 1970's. WCTO Exh. 3, at 3; Tr. 216. In addition, in December 1979 Dr. Witten produced, directed, and co-hosted (with his wife, Elaine) a special Christmas program aired on Christmas night on Channel 20. WCTO Exh. 3, at 3. He and Mrs. Witten related the Christmas story directly from the Bible. Tr. 221–23. Dr. Witten claimed the expense of that program as a business deduction. Tr. 239.

55. Dr. Lucas H. Blevins, WCTO's Secretary/Treasurer and a Director of WCTO since its incorporation in 1976 (Century Exh. 28, at 3; Tr. 479), would also work full time (40 hours per week) at the station as one of two counseling managers. WCTO Exh. 1, at 3; Tr. 484. WCTO stated that Dr. Blevins, as a counseling manager, would be responsible for the continuing recruitment, direction, training and supervision of volunteer counselors used in WCTO's call-in programs (WCTO Exh. 1, at 3), which would be broadcast two hours each evening. Tr. 196–97. Dr. Blevins stated that it "really hadn't

been decided" whether the telephone calls with which he and his volunteers would deal would be generated by a particular program broadcast over the station. Tr. 484–85. While the program, "Washington," would be broadcast while Dr. Blevins is at the station and counselors would be available during that program, the calls would not be presented as part of the on-the-air programming of "Washington." Tr. 501. Dr. Blevins would have no connection with programming except in regard to these counseling duties. Tr. 498.

56. The counseling that WCTO would provide was described variously as "listening to the needs and problems of people and trying to help them in every way that we possibly can" (Tr. 502); as "Christian counseling" (Cf. Tr. 414); or as having "a program geared toward community outreach in which they will be helping people through Christian counseling." Tr. 335. Christian counseling was described as "spiritual healing." Tr. 336. The counselors' continuing training would also include weekly sharing sessions at which the problems posed by particular callers would be shared, the counselors' responses analyzed, and the concerns of all counselors discussed. WCTO Exh. 1, at 3. The counseling managers would also coordinate activities with the leadership of churches in the greater Washington, D.C. area, including joint programs, choir, and youth group activities, ladies group activities, handicapped golf activities, school group activities, and related activities. WCTO Exh. 1, at 4. Initially, Dr. Blevins and his wife, the other counseling manager, would supervise at least 10 unpaid volunteer counselors. WCTO Exh. 1, at 4.

57. The counseling managers would also train counselors, an activity which Dr. Blevins anticipates would take from 5 to 6 hours per person. Tr. 489. He describes the training the volunteers would receive as training in dealing with people, and in choosing the right organizations to whom to refer people. Tr. 488–89. The counselors recruited would likely be Christian (Tr. 501) because of the station's Christian format. Tr. 200. Dr. Blevins believes that persons who would serve as volunteer counselors should be Christian "because they have a compassion for people that people who aren't Christian don't have. . .." Tr. 487. Dr. Blevins has received a certificate attesting to his work in alcohol rehabilitation from Lorton Reformatory. Tr. 491. He has done Christian counseling at his church, home, and office. Tr. 423. He receives constant calls at his house. Tr. 154.

58. Dr. Blevins testified that he would be at the station at least from 8:00–10:00 p.m., five days a week (Tr. 501), and expects to be paid for his work as counseling manager. Tr. 484. However, there has been no discussion concerning a specific salary figure (Tr. 484), and he does not know personally if money for salaries has been provided in WCTO's budget. Tr. 494–95. To fulfill his full-time commitment to WCTO, Dr. Blevins pledged to withdraw from the practice of dentistry once WCTO goes on the air. WCTO Exh. 4, at 3. He would continue his practice on a temporary basis were WCTO to receive a

construction permit, until someone could take over his practice. Tr. 483. At present, Dr. Blevins has identified a young man coming out of dental school who he believes would take over his practice gradually. Dr. Blevins believes that it would take six months to a year to end his practice (Tr. 483–84), but that it would "be tapering off . . . and wouldn't interfere with [his] work at the station." Tr. 484.

59. Dr. Blevins has lived and practiced dentistry in Arlington, Virginia since 1939. WCTO Exh. 4, at 1; WCTO Exh. 5, at 1. Dr. Blevins is a member of the Arlington Chamber of Commerce and the Kiwanis Club (1941 to the present); is an Elder in the Christian Assembly (from 1972 to the present); is presently serving as a board member of the Christian Service Corp., a philanthropic Christian organization; and has been the President of the Arlington Chapter of the FGBMFI since 1979. WCTO Exh. 4, at 2. Dr. Blevins anticipates continuing outside activities once WCTO begins operating the station, and estimates that he presently devotes time to these activities in the following amounts: Church—three hours per week (Tr. 479); FGBMFI—two evenings a month (Tr. 478); Director, First Virginia Bank—one to two hours per month (Tr. 476–77); Bhutan Mission—one meeting per year (Tr. 477); and Christian Service Corp.—one meeting per quarter. Tr. 477.

60. In addition, Dr. Blevins has been involved in numerous civic activities over the years. WCTO Exh. 4, at 2.

61. Dr. Blevins has known WCTO's President, Bert Carver, since the 1950's (Tr. 153), and was involved from 1971–1979 as a co-host and producer of the programs broadcast over WDCA, Channel 20, Washington, D. C., entitled "God's Good News" and "God's Great News." WCTO Exh. 5, at 2–3; Tr. 153.

62. Ms. Julia F. Carver, a Director of WCTO since 1980 (WCTO Exh. 1, at 1; Tr. 450), would work full time (40 hours per week) as the station's Marketing Director. WCTO Exh. 1, at 3; WCTO Exh. 7, at 4. Ms. Carver would be responsible for program sales, coordination of program suppliers, supervision of station salespersons (when hired), and the sale of station production program tapes from other programs once production has begun. WCTO Exh. 1, at 3. In addition, Ms. Carver would assist the Program Manager and General Manager in scheduling programming. Tr. 451–52. Initially, Ms. Carver would not supervise any sales personnel (WCTO Exh. 1, at 3; Tr. 452), but would supervise the sales staff as it is hired. WCTO Exh. 1, at 3. Ms. Carver believes that she would be selling advertising spots during WCTO's local programming, but no definite decision has been made concerning the sale of advertising spots. Tr. 470–72. Ms. Carver anticipates that she would be paid a commission on her sales (Tr. 460–62), but has not discussed a specific percentage (Tr. 461–62) and understands that most of the other WCTO staff positions would be paid a salary. Tr. 459–61.

63. Ms. Carver is female and was born in Washington, D. C.

WCTO Exh. 7, at 1. She has lived in the area all of her life. In 1961, Ms. Carver served as the first telephone chairwoman for the Christian Women's Club in the Washington, D. C. area, and later served as decorations chairwoman for two years. She has also been a Bible Study teacher. WCTO Exh. 7, at 3. Since the late 1960's, Ms. Carver has been associated with the Women's Committee for the National Symphony Orchestra, working first at the Decorator Showhouse, then as Chairwoman for Silver Spring, and finally as Chairwoman for all of Montgomery County for two years, 1977–1979. WCTO Exh. 7, at 3. From 1979 to 1981, Ms. Carver was the Chairwoman for the Women's Committee for the National Symphony Orchestra in Silver Spring. WCTO Exh. 7, at 3. From approximately 1973 to 1975, she was also a member of the Citizens' Advisory Committee for cable TV in Montgomery County, and served as chairwoman of the program committee, assisting in the production of the report on programming submitted to the Montgomery County Council. WCTO Exh. 7, at 3. Since 1977, Ms. Carver has worked with various real estate firms as a broker. WCTO Exh. 7, at 4. Presently Ms. Carver is an independent contractor working as a real estate broker with Wayne McDonald Realtors. Tr. 446. If WCTO is granted the construction permit, she will limit her present activities in the real estate business to fulfill her 40 hour week commitment to WCTO. WCTO Exh. 7, at 4.

64. Ms. Carver assisted her husband in his television work with "God's Good News," arranging trips to the studio, scheduling guests, and working with telethons. WCTO Exh. 7, at 3. Also, particularly with respect to WCTO's program, "God's Great News," Ms. Carver appeared as a hostess, arranged music for the program, lined up and helped select guests, and made sure that the stage was set up correctly. Tr. 464. At times, when Mr. Carver was traveling, Ms. Carver had to do all the work. Tr. 464.

65. Ms. Elaine H. Witten, a Director of WCTO since 1980 (WCTO Exh. 8, at 2) would work at the station full time (40 hours per week) as Program Manager. WCTO Exh. 1, at 4. As Program Manager, she would be responsible for all station programming, local and non-local, for reviewing incoming program matter to make sure that it meets the public's problems, needs and interests. WCTO Exh. 1, at 4; Tr. 272. The Program Manager, in conjunction with the General Manager and Marketing Director, would be responsible for deciding the program schedule and for scheduling special program presentations. WCTO Exh. 1, at 4–5; Tr. 273. In addition, the Program Manager would be responsible for scheduling programs for production. Tr. 273. Ms. Witten would be reviewing incoming non-local programming, as well as some local programming, including programming produced by the Riverdale Baptist Church and Hunter Ministries. Tr. 270–72. Ms. Witten would also review her husband's programs (Tr. 281), and would probably review the scripts and plans

for live programs prior to production, including her husband's local programming "to a certain extent." Tr. 281. During the initial phase of station operation, which WCTO anticipates would last approximately 12 months, Ms. Witten would not supervise any employees. WCTO Exh. 1, at 5; Tr. 269–75. After the initial phase of operation, WCTO anticipates that Ms. Witten would supervise a staff of from two to five employees. WCTO Exh. 1, at 5.

66. Ms. Witten participated as an occasional co-host in the "God's Great News" program broadcast on Channel 20, WDCA, Washington, D. C. for approximately two years, from 1975 through 1977 (WCTO Exh. 8, at 2), and as a telephone counselor during the "Good News Tonight" programs broadcast on Channel 20 in 1974. WCTO Exh. 8, at 2; Tr. 267–68, 280. Ms. Witten also participated as a co-host on a Christmas special program broadcast Christmas night, 1979. WCTO Exh. 8, at 2.

67. Ms. Witten is a black female. WCTO Exh. 8, at 1. She lived in Washington, D. C. from December 1954 through February 1972, when she moved to Falls Church, Virginia. WCTO Exh. 8, at 1–2. In June 1975, she moved to her present address in Alexandria, Virginia. WCTO Exh. 8, at 2.

68. Ms. Jean H. Blevins, a Director of WCTO since 1980 (WCTO Exh. 5, at 3) would work full time (40 hours per week) as one of two counseling managers, and her responsibility would be co-extensive with her husband's, Dr. Lucas Blevins. WCTO Exh. 1, at 4; WCTO Exh. 5, at 3. Ms. Blevins expects to get paid for her services as counseling manager once the station is operating (Tr. 414), but does not know the amount. Tr. 415. Volunteer counselors would be the only persons reporting to Ms. Blevins (Tr. 414), and she would do some counseling, but describes her role as "mostly supervising." Tr. 409–10. She describes the duties of the counseling manager as "to recruit volunteers, to teach them, instruct them, and also to supervise them in counsel[ing]." Tr. 409. Ms. Blevins described counseling as having reference to the "whole man, body, soul and spirit" (Tr. 413); it "not only looks at the problem of the individual in the physical sense and emotional sense, but also in the spiritual sense." Tr. 414.

69. Ms. Blevins, using the term "Christian counseling," stated that the principles laid down in the Bible, both the Old and New Testament, would provide guidelines for WCTO's counseling. Tr. 438–39. However, if someone were to call with respect to a health problem, she would refer that person to another agency (Tr. 432) and she would not give medical advice. Tr. 433. When asked how she would deal with the person who called in proposing to commit suicide, Ms. Blevins testified that she has received many such calls (Tr. 434), mostly from young people. Tr. 435. Ms. Blevins testified that in response to such a call, she would "listen to them. . . . We listen to hear what is causing them to feel this way." Tr. 435. If

necessary, the caller would be referred to a mental health agency (Tr. 435), or, if the person was young, the parents would be called. Tr. 435.

70. Dr. and Mrs. Blevins, as counseling managers, would train and supervise at least 10 volunteer unpaid counselors (Tr. 411), but since there would be a turnover, there would need to be many counselors trained. Tr. 432. Ms. Blevins noted that counselor training would likely require one to three hours per person. Tr. 412.

71. Ms. Blevins has counseled people before, in her home, her husband's office, and in her church. Tr. 423. In addition, she has been involved in some counseling over the air and over the phone. Tr. 425. She acted as a television counselor with the program, "God's Good News." Tr. 434. Ms. Blevins has also been a telephone counselor for the 700 Club, where she first used a referral book and saw a manual for Christian counseling. Tr. 437–38. Ms. Blevins, with her husband, Dr. Blevins, was involved as a co-host and producer of "God's Good News" and "God's Great News." WCTO Exh. 5, at 2–3.

72. One technique used by Ms. Blevins and her husband is laying of hands on people so that limbs can grow or bones can be settled or reset, and "we state that" the "legs grow out and so forth" and that the arms will straighten out. Tr. 424. Although she does not expect to provide this type of counseling over the phone, if requested by a caller to provide this service at their home or the caller's home, "I believe that my husband and I would do that if it didn't—if our bodies hold up that long." Tr. 426. Ms. Blevins was referring to her age which is 72. WCTO Exh. 5, at 1.

73. Since 1939, Ms. Blevins has lived in Arlington, Virginia. WCTO Exh. 5, at 1. Ms. Blevins is active in church work. She presently teaches Bible classes at her church and in various homes. WCTO Exh. 5, at 2. Ms. Blevins devotes approximately two to three hours per week to her church activities. Tr. 401.

74. The Reverend Charles R. Hayes, a Director of WCTO since January 1980 (WCTO Exh. 9, at 1) would work full time (40 hours per week) at the station as WCTO's Public Relations Director. WCTO Exh. 1, at 5; WCTO Exh. 9, at 1. As Public Relations Director, Rev. Hayes would be responsible for writing both internal and external communications, including weekly, daily, and monthly reports; and also for developing relations with the press, radio and television representatives, and with the public. WCTO Exh. 1, at 5. Rev. Hayes would be responsible for reviewing letters of inquiry, and for organizing open houses and lobby displays. WCTO Exh. 1, at 5; Tr. 307. Rev. Hayes also anticipates interviewing individuals and visiting churches. Tr. 309. Finally, the Public Relations Director would be responsible for developing and contacting sources of additional donations when income from advertising and other income is not adequate to maintain a sound financial base. WCTO Exh. 1, at 5; Tr. 329. During the initial phase of the station operation,

it is not anticipated that Rev. Hayes would supervise any station employees (WCTO Exh. 1, at 5), but following this initial phase of the station operation, it is anticipated that Rev. Hayes would supervise a public relations staff of from one to three employees. WCTO Exh. 1, at 5. Rev. Hayes believes he would receive a salary for working at the station, but does not know the amount of the salary. Tr. 304. When questioned whether he would work for no pay, Rev. Hayes answered, "Yes, I would. I would have to say 'yes' because I'm getting out entirely to serve the Lord, and I would try to do what I could to further the aims of Christian broadcasting, . . ." Tr. 327–28.

75. Rev. Charles R. Hayes is a black male. He moved to Washington in 1958. In 1967 he opened the Grace Temple Religious Goods Store, and was ordained for the ministry by the Mooth Fountain Home Baptist Church on 9th Street. Tr. 296. Rev. Hayes' status as a minister is recognized by the D.C. government. Tr. 297. Grace Temple Church was started in 1970 (Tr. 297), and Rev. Hayes has pastored Grace Temple since then. Tr. 298. He is supported by the contributions of the twelve families in the congregation (Tr. 298), receiving approximately $1,000 a month in contributions. Tr. 305. Rev. Hayes describes his present activities as including two to three hours on Sunday and approximately four hours a week counseling at various hospitals. Tr. 298–99. Rev. Hayes has told his congregation of his plans to work full time at WCTO. However, he would maintain the present level of his activity at Grace Temple while working full time for WCTO. Tr. 300–01. In 1973, he became the Vice Chairman of the 14th Street Project Area Committee of RLA. He has been a member of the 14th Street Ministerial Board since 1973. WCTO Ex. 9, at 1.

76. Ms. Joe-Ann Hayes, a Director of WCTO since January 1980 (WCTO Exh. 6, at 2), would work full time, 40 hours per week, as News Director of WCTO's proposed station. WCTO Exh. 1, at 6; WCTO Exh 6, at 2. As News Director Ms. Hayes would be responsible for editing and presenting the station's news (WCTO Exh. 1, at 6), producing news broadcasts (Tr. 199), and would supervise both the technicians and cameramen necessary for news remotes and the volunteers, which WCTO anticipates would assist in initial news gathering and production. WCTO Exh. 1, at 6. WCTO presently proposes three hours per week of news, at 30 minutes per day (Tr. 199; 366–67) and she would be the only person on the news staff when the station commences operation. Tr. 199. The station would rely primarily on local news and upon wire service copy. Tr. 367. Local news would be gathered by her and through volunteers. Tr. 367.

77. Ms. Hayes did not know if the WCTO budget had any allocation for news, or whether provision had been made for news programming equipment such as a camera and tape recorder. Tr. 368, 379. If equipment is available, she would operate them herself if

she does not have a volunteer. Tr. 379. She did not know who would be reading the news over the air or even if she would be doing that. Tr. 380. In response to a question about the need to prepare for over-the-air news broadcasts before the actual broadcast, Ms. Hayes admitted that "I know absolutely nothing about the news at the present time." Tr. 381. Ms. Hayes testified that the offices and studio for WCTO would be in Wheaton, Maryland (Tr. 369), though she changed her answer when shown the WCTO application that lists Washington, D. C. as the location. Tr. 369–70.

78. Ms. Hayes is a black female, and has lived her entire life in Washington, D. C. WCTO Exh. 6, at 1. In June of 1981, Ms. Hayes became a Supervisor of Central Vault at the First American Bank of Maryland, Columbia, Maryland, a management position in which she supervises two departments: Central Payments and the Central Vault. WCTO Exh. 6, at 1. In that capacity Ms. Hayes is responsible for processing all payments and deposits made by mail, including seeing that all cash orders and shipments are properly placed and accounted for. WCTO Exh. 6, at 1. Ms. Hayes is paid $13,400 annually for her work at First American National Bank, and she would reduce her work week to 20 hours a week or less to accommodate her full 40 hour week commitment at the station.[14] WCTO Exh. 6, at 2; Tr. 352. Ms. Hayes has discussed her plans concerning WCTO with her supervisors. Tr. 352–53. Based on these discussions, Ms. Hayes would be allowed to work four hours a day and still be considered full time (Tr. 352–53), and, despite a decrease in her working hours, there would be no decrease in her salary. Tr. 354. Her time working at the station would be broken down as eight hours, Monday through Friday, at the station and four hours at the bank. Tr. 369. Ms. Hayes expects to be paid for her work at the station but has never discussed a specific salary. Tr. 365–66.

79. Ms. Hayes is married to Reverend Charles R. Hayes. WCTO Exh. 6, at 1. She serves as Choir Director of Grace Temple, the church which her husband pastors, and is a member of the Church Mother Board and Senior Missionary. WCTO Exh. 6, at 1–2. Ms. Hayes is active in missionary work for the church. It is an activity which takes approximately two to three hours a week. WCTO Exh. 6, at 2.

80. *Century Communications, Inc.*: Century proposes to integrate the following eleven stockholders: Steven Wechsler, who is Century's Executive Vice President, a Director, and 15.57 percent stockholder, is proposed as the station's General Manager. Century Exh. 1, at 1; Century Exh. 2, at 2. He would work full time. Century Exh. 2, at 2. Mr. Wechsler lives in the Washington area where he is an owner and is in charge of the financial and business affairs of Marquee

[14] She works each business day from 8:30 a.m. to 5 p.m. and has more than one hour commute, each way, by public transportation. Tr. 352–92.

Television Network, Inc., a pay television service distributed by an MDS operator. Century Exh. 2, at 1–2.

81. Pauline Wechsler, who is Century's President, a Director, and 19.80 percent stockholder, proposes to spend 20 hours a week performing her duties as President and Director of Century. Century Exh. 1, at 1; Tr. 783. She will determine and review the policies of Century in connection with the station and she will represent Century at meetings, functions and activities in the Washington, D. C. area. Century Exh. 3, at 3. Ms. Wechsler stated that she would not be managing the day-to-day operations of the station. Tr. 778. Ms. Wechsler lives in the Washington area and has long been active in a variety of civic and philanthropic activities. Century Exh. 3, at 2.

82. Peter Yeskel, who is Century's Secretary-Treasurer, a Director and 13.35 percent stockholder (Century Exh. 1, at 2), proposes to spend, on the average, 30 hours per week carrying out the duties of Secretary-Treasurer and Chief Financial Officer—comptroller of Century. Century Exh. 4, at 2. Mr. Yeskel stated that on a week-to-week basis he would not necessarily spend 30 hours at the station. Sometimes the time spent at the station might be as little as ten or fifteen hours. Tr. 611–612; 631. The number of hours would depend on whatever kinds of business problems he had in other areas. Tr. 632. His duties would include preparing budgets, financial projections and financial analyses, establishing bookkeeping procedures, supervising billings, collections and accounts payable. Century Exh. 4, at 1. He would also supervise all employees involved in Century's financial affairs and would review station performance. *Id.*, at 2. Mr. Yeskel lives in Bethesda, Maryland. *Id.*

83. Diane Wechsler, who is a 10.46 percent stockholder of Century, proposes to work full time as the station's Customer Service Manager. Century Exh. 6, at 1. She would be responsible for implementing Century's procedures for considering suggestions and complaints, ascertaining community needs, and she would review Century's performance. *Id.* Ms. Wechsler lives in a Washington, D. C. suburb. *Id.*

84. Charles Bennett Fisher, who is Century's Vice President, a Director, and a 2.70 percent stockholder, proposes to work full time as the Director of Community Relations and Special Affairs. Century Exh. 1, at 1; Century Exh. 7, at 2. In this position Mr. Fisher would implement all public affairs programming at the station, supervise employees responsible for the programming and administer and implement Century's equal employment opportunities program. *Id.*; Tr. 660–61. In the past Mr. Fisher has been active in party politics and in 1967 he hosted a radio show for one year called "The Right to Succeed." Century Exh. 7, at 1. Mr. Fisher has always lived in Washington, D.C. and he is black. *Id.*

85. Eugene Aikens, Jr., who holds 6.67 percent of Century's stock, proposed to work on a part-time (30 hours per week) basis as

the station's Personnel Director. Century Exh. 1, at 1; Century Exh. 8, at 1. He would, subject to the supervision of the General Manager, hire and fire all personnel. Mr. Aikens is black and lives in Washington, D. C. *Id.*

86. Dr. Everett J. Gordon, who is a Director of Century and 3.56 percent stockholder, proposes to work as Director of Special Projects on a part-time basis (20 hours per week). Century Exh. 1, at 1; Century Exh. 9, at 3. Dr. Gordon would act as the station's contact with community groups, would be "involved" in all aspects of non-entertainment programming, and assist other integrated principals. *Id.*; Tr. 680. He would supervise employees as required. Century Exh. 9, at 3; Tr. 681–82. Dr. Gordon lives in Washington, D. C. He is retired and he has been active in civic affairs. Century Exh. 9.

87. Claudia R. Rayford, who is a 1.78 percent owner of Century (Century Exh. 1, at 1), proposes to work 20 hours per week as the Director of Business Development. Century Exh. 10. In this position she would set station advertising policy and would serve as the link between the Director of Advertising and Marketing and the General Manager. Tr. 705. She would also develop "rapport" with advertising agencies. Tr. 706. Ms. Rayford has, to some extent, participated in community civic affairs. She has participated in auxiliaries of her husband's professional organizations, which appear to exhibit an interest in the community. Century Exh. 10, at 1–2. She is black and lives in Washington, D. C. Century Exh. 10.

88. Dr. Frances E. Rankin, who is an owner with her husband as a tenant by entirety of 2.67 percent of Century stock, proposes to work as Director of Women and Children's Programming for 20 hours per week. Century Exh. 1, at 2; Century Exh. 11, at 2. She has plans to implement two programs, one scheduled for weekdays and the other for Saturdays, and supervise employees as necessary. Century Exh. 11, at 2. Dr. Rankin is black, lives in Chevy Chase, Maryland and belongs to the NAACP and various professional organizations. Century Exh. 11, at 1.

89. Edna R. Jones, who with her husband as tenants by entirety, owns 1.78 percent of Century stock, proposes to work 20 hours per week as Director of Consumer Affairs. Century Exh. 1, at 2. Century Exh. 12, at 2. She would supervise the implementation of consumer programming. Century Exh. 12, at 2; Tr. 738. She is black, lives in Chevy Chase, Maryland, and has demonstrated an interest and participation in local civic affairs. Century Exh. 12.

90. Brenda Gladden, who with her husband as tenants by entirety, owns 4.45 percent of Century's stock and is a Director, proposes to work 20 hours per week as house counsel and Legal Affairs Director. Century Exh. 1, at 1; Century Exh. 13, at 1; Tr. 701–02. Her work would involve development of contracts and collections. Tr. 694. She claims this would also involve her in Century's non-entertainment programming. Century Exh. 13, at 1. Ms. Gladden is

black, lives in Washington, D. C., and has listed membership in various social clubs and auxiliaries of her husband's professional organizations. Century Exh. 13, at 1–2.

91. *Capital Communications, Inc.*: Each of the eight Capital Communications' stockholders holds 12.5 percent of the stock. However, at the cut-off date there was one more stockholder, Hortensia Alvirez, who withdrew, and if her interest is not counted as being redistributed, each of the stockholders would hold an 11.11 percent interest. CapCom Exh. 1A, at 1; Tr. 915, 1008.

92. Karen L. Braun, who is Secretary and a Director of Capital proposes to work full time as the Assistant General Manager. CapCom Exh. 4. Ms. Braun would participate in overseeing all aspects of station operation. Tr. 1062. She would assist the General Manager in formulating and implementing policies regarding station personnel and programming. She would have primary responsibility for the business management of the station and would have supervisory authority over all station personnel. CapCom Exh. 3A, at 4. While stockholder employees would be supervised by Ms. Braun and the General Manager, they would, as Directors, ultimately review the General Manager's performance. Tr. 1068. Ms. Braun lives in Rockville, Maryland and has been active in civic and community affairs. CapCom Exh. 4, at 1–3.

93. Yetta W. Galiber, who is a Vice President and a Director of Capital, proposes to work part time as Assistant Program Manager, staff producer and talent. CapCom Exh. 8, at 1. Ms. Galiber would be responsible for the production of some local programming which she would host. CapCom Exh. 3A, at 5. Ms. Galiber is black, lives in Washington, D. C. and has participated in numerous civic activities. Her concern has been with employment and education of the disabled, day care, civil rights, and the provision of community services. CapCom Exh. 8; Tr. 1126–27.

94. A. Diane Graham, who is President and a Director of Capital, proposes to work part time as Assistant Program Manager and staff producer. She would have responsibility for producing some local programs and would appear in some. CapCom Exh. 3A, at 5; Tr. 863–64. Specifically, she would produce a program to be called "Maryland Forum" (Tr. 864) and a children's program using a magazine format. Ms. Graham lives in Potomac, Maryland, is black, and has appeared on numerous public affairs television programs about employment discrimination. CapCom Exh. 9, at 1; Tr. 852.

95. Margaret T. Johnson, who is the Assistant Secretary and a Director of Capital, proposes to work full time at the station as Assistant Station Manager and Director of Administration. CapCom Exh. 6, at 4. She would assist the Station Manager in coordinating and overseeing all day-to-day operations. She would be responsible for recordkeeping, bookkeeping, and paperwork. Tr. 1184; CapCom Exh. 6, at 4. Ms. Johnson lives in Vienna, Virginia and has

participated in numerous community activities over a long period of time. Her civic activities establish a strong record of community involvement. CapCom Exh. 6, at 1–4.

96. Nancy McCormick-Pickett, who is an Assistant Vice President and a Director of Capital, proposes to work full time as Station Manager. CapCom Exh. 5, at 4. She would be responsible for coordinating technical operation, program scheduling, regulation of work schedules, and facilities scheduling. CapCom Exh. 5, at 4; CapCom Exh. 3A, at 4; Tr. 1278–80. She proposes to produce a public affairs program to be called "Your Health." CapCom Exh. 5, at 4. Ms. McCormick-Pickett lives in Arlington, Virginia, is black, and has been active in civic affairs. CapCom Exh. 5, at 1, 3–4. While Ms. McCormick-Pickett has not worked at a broadcast station, she has had substantial media experience. She holds degrees in communications from Stanford University and American University. She has attended the Stanford Film and Broadcast Institute and a management training program sponsored by the National Association of Broadcasters at the Harvard School of Business. CapCom Exh. 5, at 1; Tr. 1274–75. She has been on the public affairs staff of the United States Information Agency, worked at the National Association of Broadcasters, where she directed the Employment Clearing House, has been a director of communications for the Cancer Coordinating Council of Metropolitan Washington and has acted as a consultant to the Consumer Assistance Division of this agency, the Federal Communications Commission. CapCom Exh. 5, at 2–3; Tr. 1275, 1276. She is an active member of American Women in Radio and Television. *Id.*

97. Thelma J. Mullin, who is Treasurer and a Director of Capital, proposes to work as the part-time Personnel Manager and on-air talent. CapCom Exh. 10, at 1. As Personnel Manager, she would be responsible for preparation and implementation of personnel policies and a personnel manual, hiring and firing, and personnel management. CapCom Exh. 10, at 1; CapCom Exh. 3A, at 6; Tr. 1203; 1217–18; 1220. She anticipates that the on-air appearances would be on programs that deal with handicapped children and the needs of inner-city blacks, areas that she has been much involved with over the past several years. Tr. 1209. She lives in Washington, D. C. and has an extensive record of participation in civic affairs. CapCom Exh. 10, at 1, 2; Tr. 1198.

98. Lili S. Packer, who is an Assistant Vice President and a Director of Capital, proposes to work part time as Co-Director of Public Affairs and Assistant Program Manager. CapCom Exh. 11, at 3. She would be responsible for publicity, promotion, and public relations. CapCom Exh. 11, at 3. Ms. Packer would supervise production of the proposed program, "Hispanic Highlights," and she would be engaged in the preparation and production of other programs directed to the Hispanic community. *Id.*; Tr. 894–95. In

addition, Ms. Packer would administer the station's planned internship program for communications students CapCom Ex. 3A, at 6; Tr. 899. She would also supervise the station's dual-language project, which is intended ultimately to provide simultaneous dual-language audio to the Spanish speaking audience. CapCom Exh. 3A, at 6, CapCom Exh. 11, at 3. She lives in Washington, D. C. Although she was born in Argentina, she is a naturalized citizen, and she has been active in local civic affairs. CapCom Exh. 11, at 1, 2, 3; Tr. 910.

99. David J. R. Pales, who is a Vice President and a Director of Capital, proposes to work part time at the station as Co-Director of Public Affairs and Comptroller. CapCom Exh. 7, at 2; Tr. 1230. Mr. Pales lives in Washington, D. C. and is Hispanic. CapCom Exh. 7, at 1.

100. Each of the foregoing Capital stockholders and directors would serve on four standing committees, which would meet on a monthly basis, or more frequently when the situation warrants. CapCom Exh. 3A, at 6; Tr. 874; 1060; 1073. These committees would consider station editorial policy, programming philosophy, complaints, and community relations. *Id.*

101. *Grant Broadcasting Corporation*: Two of the three principals of Grant Broadcasting Corporation would be integrated into the management of the station. Milton Grant, who is the President, a Director, Chairman of the Board, and 50 percent shareholder, proposes to work full time at the station as its General Manager. Grant Exh. 3, at 1. Mr. Grant lives in Texas but he commutes to Washington on a regular basis and he owns a house in Bethesda, Maryland. Grant Exh. 3, at 1; Grant Exh. 1, at 1; Tr. 1524. In Texas, he is the full-time President (Chief Executive Officer) and General Manager of Station KTXA-TV, Fort Worth, Texas. Grant Exh. 1, at 5. He has also agreed to supervise the construction of Station KTXH-TV, Houston, Texas. *Id.*

102. Milton Grant has worked as a broadcaster since 1947. Grant Exh. 1, at 3. From the time television station WDCA, Channel 20, Washington, D. C. began operation in 1966 until 1979, Mr. Grant was the station's General Manager. He also had the responsibility of putting the station on the air and until the station was sold in 1969 to Superior Tube Company, he controlled 50 percent of the station's stock. Grant Exh. 1, at 5; Tr. 1526–28. Even after the station was sold, he remained Vice President, Director and General Manager of the station and received 5 percent of the net profits. Tr. 1528–30. As a practical matter, he made the decisions about the station's programming, although Superior Tube could, but never did, overrule him. Tr. 1535–36.

103. An analysis of official program reports filed with the Commission by WDCA and other television stations licensed to Washington, D. C. for the years 1973–1979, disclose the following

news and public affairs program percentages for the complete broadcast day of each year's composite week:

	1973	
	News	*Public Affairs*
Average of all D. C. stations	8.1	6.3
WTTG (Ch. 5)	6.8	6.7
WDCA (Ch. 20)	1.2	1.6

	1974	
	News	*Public Affairs*
Average of all D. C. stations	7.7	6.4
WTTG	5.6	5.4
WDCA	1.1	2.0

	1975	
	News	*Public Affairs*
Average of all D. C. stations	8.5	6.6
WTTG	4.8	6.5
WDCA	1.2	1.1

	1976	
	News	*Public Affairs*
Average of all D. C. stations	8.6	5.9
WTTG	4.5	5.7
WDCA	1.1	.9

	1977	
	News	*Public Affairs*
Average of all D. C. stations	8.6	5.9
WTTG	4.4	4.9
WDCA	1.3	.8

	1978	
	News	*Public Affairs*
Average of all D. C. stations	7.4	5.1
WTTG	4.3	4.2
WDCA	1.2	.7

	1979	
	News	*Public Affairs*
Average of all D. C. stations	7.4	5.2
WTTG	3.9	4.1
WDCA	1.0	1.0

Century Exh. 26, at 37–38, 47–48, 56–57, 66–67, 76–77, 86–87, 96–97.

104. Washington, D. C. is ranked as the eighth television market.

A further analysis of the program performance for the period 1973–1979 for WDCA as compared with independent UHF television stations in markets ranked sixth (Boston, Mass.), seventh (Detroit, Mich.), ninth (Cleveland, Ohio), and tenth (Dallas-Forth Worth, Texas) disclosed the following overall station rankings, as contained in the stations' annual programming reports showing the percentages of news and public affairs aired during the complete broadcast day:

1973

Number of stations reporting: Nine.

	News
First Ranking, KXTX, Dallas-Ft. Worth	2.3
Ninth Ranking, WXON, Detroit	0
Eight Ranking, WDCA	1.2
	Public Affairs
First Ranking, WSBK, Boston	4.5
Eighth and Ninth Ranking WXON, Detroit and KXTX, Dallas-Ft. Worth	0
Seventh Ranking, WDCA	1.6

1974

Number of stations reporting: Nine

	News
First Ranking, KXTX, Dallas-Ft. Worth	2.3
Ninth Ranking, WXON, Detroit	0
Eighth Ranking, WDCA	1.1
	Public Affairs
First Ranking, KXTX, Dallas-Ft. Worth	12.1
Ninth Ranking, WXON, Detroit	1.3
Eighth Ranking, WDCA	2.0

1975

Number of stations reporting: Eight.

	News
First Ranking, KXTX, Dallas-Ft. Worth	2.3
Eighth Ranking, WXON, Detroit	0
Seventh Ranking, WDCA	1.2
	Public Affairs
First Ranking, WSBK, Boston	5.3
Eighth Ranking, WDCA	1.1

1976

Number of stations reporting: Nine.

	News
First Ranking, WGPR, Detroit	4.8
Ninth Ranking, WXON, Detroit	.4
Seventh Ranking, WDCA	1.1

	Public Affairs
First Ranking, WSBK, Boston	5.0
Ninth Ranking, WDCA	.9

1977

Number of stations reporting: Ten.

	News
First Ranking, WXNE, Boston	4.2
Tenth Ranking, WSBK, Boston	.7
Seventh Ranking, WDCA	1.3

	Public Affairs
First Ranking, WSBK, Boston	5.2
Tenth Ranking, WDCA	.8

1978

Number of stations reporting: Nine.

	News
First Ranking, WXNE, Boston	3.4
Ninth Ranking, WSBK, Boston	.7
Fifth Ranking, WDCA	1.2

	Public Affairs
First Ranking, WUAB, Cleveland	6.5
Ninth Ranking, WDCA	.7

1979

Number of stations reporting: Ten.

	News
First Ranking, WXNE, Boston	3.4
Tenth Ranking, WSBK, Boston	.7
Eighth Ranking, WDCA	1.0

Century Exh. 26, at 29–95.

105. The foregoing comparison of WDCA's programming performance with other stations in the Washington, D. C. market and with independent UHF stations in other comparable markets were made on the basis of the complete broadcast day of sign-on to sign-off. WDCA broadcast a substantial portion of its news programming between the hours of midnight and 6:00 a.m., as indicated by the following comparison of WDCA news program percentages, for this time slot and for the complete broadcast day:

	News						
	1973	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*
Complete Broadcast Day:	1.2	1.1	1.2	1.1	1.3	1.2	1.0
Midnight to 6:00 a.m.	.5	.5	.5	.5	.5	1.0	.6

Century Exh. 26, at 14–20, 38, 48, 56, 66, 77, 87, 96.[15]

106. Lawrence J. Brailsford, who is Vice President, a Director, and a 25 percent shareholder of Grant, proposes to work as the part-time (12 hours per week) Public Affairs Director. Grant Exh. 3, at 1. Mr. Brailsford is black and lives in the District of Columbia.

107. *Urban Telecommunications Corporation*: Theodore M. White, who is the President and sole shareholder of Urban Telecommunications Corporation, proposes to serve as the full-time General Manager of the facility. Urban Exh. 5, at 1. Mr. White is black, lives in the District of Columbia, and is not involved in any civic activities. *Id.*, Tr. 2261. He has no prior broadcast experience. Tr. 2249.

108. *Washington Television, Inc.*: Washington Television, Inc. proposes that two of its four shareholders would be integrated into management Dr. Joann Anderson, who is Treasurer, a Director, and holds a 53.6 percent interest in Washington Television, Inc., proposes to work full time as the station's General Manager. WTI Exh. 1A, at 3; WTI Exh. 2, at 2; Tr. 2448–49, 2573. She would be responsible for implementing station policy and guidelines and would be the primary station representative in community activities. WTI Exh. 2, at 2; Tr. 2558. Dr. Anderson holds graduate degrees in mass communications and works for the United States Department of Commerce, National Telecommunications and Information Administration, Public Telecommunications Facilities Program as a Program Officer. WTI Exh. 2, at 1, 2. The organization she works for finances the construction of nonprofit broadcast and non-broadcast telecommunications facilities. *Id.*

109. Dr. Anderson owned and worked part time as Assistant General Manager of WOWD(FM), Tallahassee, Florida. Tr. 2541–42, 2560–69, 2571. While Dr. Anderson told the Commission when she applied for WOWD in 1975 that she would be the general manager of the station, instead after a grant was made, she decided to go to graduate school. Century Exh. 34, Tr. 2564, 2571. This decision occurred after the competing applicant dropped out and the con-

[15] Mr. Grant, in order to demonstrate that the above data are not an accurate picture of Channel 20's performance, submitted detailed analysis of 1977. Grant assessed Channel 20's news and public affairs programming for alternate months during 1977 to demonstrate that substantially more news and public affairs were televised than the composite weeks referred to by Century. This evidence is not comparable, however, since Grant did not undertake a similar study of the other stations and compare it to Channel 20's performance. There is no way of telling if Grant had assessed the programming of other stations in the same way whether Channel 20's performance would still be relatively the same. See Grant Exh. 4, Attach. A, at 27–28. Thus, the evidence submitted is not probative without making highly subjective determinations about the value of a specific program. The information submitted by Grant provided only its own view of the value of Milton Grant's record at WDCA.

struction permit was granted. After she finished her graduate studies, she became the general manager for a four month period in 1979. Tr. 2542–43, 2561. There is no evidence in the Commission's records that Dr. Anderson or the station ever notified the Commission of the change.

110. Dr. Anderson lives in Bethesda, Maryland, is black, and works (since September 1981) with the Cub Scouts in Bethesda two hours per month. WTI Exh. 2, at 1, 3.

111. Lonnie Murray, who is President, a Director, and a 16.5 percent owner of Washington Television, Inc., proposes to work full time as Program and Operations Manager. WTI Exh. 1A, at 3, 4; Tr. 2395. Mr. Murray would supervise programming, traffic, administrative, and engineering personnel at the station. He would also have responsibility for preparation and administration of the budgets in all departments. WTI Exh. 1A, at 4; Tr. 2398, 2415–17. Mr. Murray is an owner of WWIW, New Orleans and has been since March 1977. Beginning in September 1977 and ending in May 1979, he was the President and two-thirds owner of the corporation that held the license for WWIW. WTI Exh. 1A, at 4. During that period the station manager reported to Mr. Murray daily and he visited the station approximately once a month. WTI Exh. 1A, at 4.

112. *WSCT-TV, Inc.*: WSCT-TV, Inc. is wholly owned by Formula Telecommunications, Inc. WSCT Exh. 1, at 1. The officers and directors of WSCT-TV are also officers and directors of Formula. WSCT Exh. 1, at 1, 2. George C. Corbin, III is President and a Director of the applicant, WSCT-TV, Inc., and he is President and Chairman of the Board of Directors of Formula. WSCT Exh. 1, at 1, 2. Mr. Corbin is a 36.72 percent owner of Formula. He proposes to work full time as General Manager of the station. WSCT Exh. 3, at 1. He would be responsible for overseeing and coordinating all functions of the operation. Tr. 1670.

113. Mr. Corbin has television and radio broadcast experience. He has been a radio announcer, television floor director, assistant director/associate producer for station productions at a Washington, D.C. television station; a director and operations manager at a television station in Goldvein, Virginia; and studio coordinator for the ABC network in New York. WSCT Exh. 4, at 1, 2. Mr. Corbin lives in Washington, D.C. and is black. WSCT Exh. 4, at 1.

114. Thomas A. Farrand is a Vice President and Director of the applicant and Vice President - Creative Services Director of Formula, of which he is a 13.77 percent owner. WSCT Exh. 1, at 1, 2. Mr. Farrand proposes to work full time as the station's Program Director. WSCT Exh. 3, at 1. He would direct programming activities, including production scheduling, and program acquisition. *Id.* Mr. Farrand has worked at a radio station, several television stations and produced an independent television program, "International Assignment." WSCT Exh. 6, at 2. His television work has been

as an assistant director, assistant producer, and producer and director of local and children's programming. WSCT Exh. 6, at 1, 2.

115. Mr. Farrand lives in the Washington, D.C. area and is active as a priest in his religion, the Temple of Cosmic Religion. WSCT Exh. 6, at 1, 3. He is also director of religious education for the Christ Interfaith Community Church, which is located in Washington, D.C. WSCT Exh. 6, at 2.

116. Amy C. Gilbert is a Vice President and Director of WSCT and Vice President, Director, and Treasurer of Formula, of which she is a 13.77 percent owner. WSCT Exh. 1, at 1, 2. She proposes to work 20 hours per week, or part time, as the Business Manager or Comptroller of the station. WSCT Exh. 3, at 1. Ms. Gilbert lives in Washington, D.C. WSCT Exh. 5, at 1.

117. Armando B. Rendon is Corporate Secretary of WSCT and Formula and he owns 11.47 percent of Formula. WSCT Exh. 1, at 1, 2. He proposes to work full time as the Station Manager. WSCT Exh. 3, at 1. Mr. Rendon would be the primary person responsible for the day-to-day administration of the station. *Id.* Mr. Rendon is a Hispanic-American, lives in the District of Columbia, and is very active in local civic affairs. WSCT Exh. 7, at 1–3. He has been the host and producer of a radio public affairs program and he holds a 10 percent interest in Los Cerezos Television Company, the licensee of an experimental television broadcast translator station on Channel 56 in Washington, D.C. WSCT Exh. 7, at 1; WSCT Exh. 2. Mr. Rendon was President of the Board of Los Cerezos from 1980 to 1981. Tr. 1911; WSCT Exh. 7, at 1. In addition, Mr. Rendon works as a public information officer at the U.S. Bureau of the Census. WSCT Exh. 7, at 1.

118. Bill E. Tucker is Vice President - Sales of WSCT and a Vice President and Director of Formula, of which he holds a 4.61 percent interest. WSCT Exh. 1, at 1, 2. He proposes to work full time as the station's Sales Manager. WSCT Exh. 3, at 2. He would have responsibility for all sales and would supervise the station's traffic, promotion and sales functions. *Id.* Mr. Tucker has worked as an account executive and local sales manager at two major market television stations and as an account executive at ABC and NBC. WSCT Exh. 8, at 1–2. He also held a similar position at Blair Television from 1979 to 1981. *Id.*

119. Mr. Tucker is black, he lived in Washington from 1978 to 1980, but since 1980 he has lived in New York City. He would move to Washington to work at the station. WSCT Exh. 8, at 1.

120. Van F. Alexander is the Vice President - Corporate Relations of WSCT and a Vice President and Director of Formula, of which he is an 11.47 percent owner. WSCT Exh. 1, at 1. Mr. Alexander proposes to work full time as the station's Director of Public Affairs. WSCT Exh. 3, at 2. He has taken training in radio and television skills and he worked as a sound technician at two

Washington, D.C. television stations from 1967 to 1972. WSCT Exh. 9, at 1. Mr. Alexander also was President of and worked at New Image, Inc., a television production firm. *Id.*

121. He lives in New Carrollton, Maryland, is black and has been particularly active in Washington civic activities, such as D.C. Reading Is Fundamental and the Work Education Council of the Washington Metropolitan Council of Governments. WSCT Exh. 9, at 1, 2; Tr. 2021.

122. Two issues about WSCT's ownership—and therefore its integration, have been raised. WSCT's parent, Formula Telecommunications, Inc. has received a $10,000 loan from Syncom Capital Corporation. WCTO Exh. 14, at 2. Formula has used the loan to finance its syndicated program production. Tr. 1924. Formula is obligated to repay the loan with interest. WCTO Exh. 14, at 2.

123. In addition, by letter dated December 17, 1980 Syncom has also promised to lend Formula $500,000. WCTO Exh. 14, at 1. Of that amount, $300,000 represents a ten-year subordinated note carrying interest at 14 percent. *Id.*, at 1–2. The $300,000 loan commitment is available to WSCT upon grant of the construction permit from the FCC to build and operate Channel 14 in Washington, D.C. *Id.*, at 3. The remainder, consisting of $200,000, would be available on demand by Formula during the first one and one-half years after closing on the first portion of the loan. *Id.*, at 2. If any of this money is borrowed, it would be incorporated into the subordinated note after passage of the year and one-half. *Id.*

124. If the loan is made, Syncom would receive warrants convertible into Formula stock. The value of warrants would depend on the equity raised by Formula. If more than $1 million in equity is raised by Formula, the warrants will be equal to 1,000 shares or 10 percent of Formula's stock. WCTO Exh. 14, at 2. If Formula fails to reach $1 million in equity, the warrants would be increased, pursuant to a schedule, up to a maximum of 2,000 shares or 26 percent of Formula's stock, depending on the dollar amount of the equity raised by Formula. *Id.* Further, if the $200,000 in demand funds is called upon, Syncom is entitled to warrants sufficient to maintain a 26 percent interest. *Ibid.*

125. Syncom's loan commitment to Formula also contains a put/call provision. From the fifth to tenth years after closing, Syncom has the right to sell, or put, its warrants to Formula, and Formula has the right to purchase, or call, the warrants held by Syncom. WCTO Exh. 14, at 3. The warrants are to be acquired by Formula at fair market value as determined by appraisers. *Id.* The possible maximum of $500,000 in loan funds from Syncom to Formula must in any event be paid back—totally aside from the warrants—pursuant to the subordinated note provided for in Syncom's commitment letter. WCTO Exh. 14, at 1–2.

126. Syncom's loan commitment letter makes reference to the

$10,000 loan, but does not tie it to any requirement that future funding also be obtained by Formula from Syncom. WCTO Exh. 14, at 2. In fact, the $10,000 loan is repayable on its own terms and at a 16 percent interest rate under a demand note maturing on December 21, 1982. *Id.*

127. In an "Agreement" dated January 14, 1981, appended to the loan commitment letter, Formula has agreed—as consideration for the $10,000 loan—"to provide Syncom with a right to purchase warrants and to participate in the financing for the start-up and construction of FTI's [Formula Telecommunications Incorporated's] station and other business operations as outlined in Syncom's commitment letter to FTI dated December 17, 1980." WCTO Exh. 14, attached Agreement.

128. Participation of Syncom is, in any event, not necessary to WSCT's financing of its proposed station. Speaking to this issue, the Commission said, in the *Hearing Designation Order* (46 Fed. Reg. 43737, 43742 (1981)):

> Since the loan from MNB (Maryland National Bank) is sufficient to cover the construction and operation of the proposed facility, further analysis of WSCT's financial sources is not necessary. Accordingly, a financial issue will not be specified.

129. The second issue raised has to do with whether Formula has established a voting trust that distorts ownership. George Corbin explained how the trust would work (WSCT Exh. 29, at 2):

> This block of 5,500 shares would consist of the shares held by myself, Thomas Farrand, Amy Gilbert, Armando Rendon, Bill Tucker, and Van Alexander, and of these individuals, Armando Rendon, Bill Tucker, Van Alexander, and myself are minority group members. Together we hold 70% of the shares in the 5,500 share block. Through this means, we could insure that even if all 10,000 authorized shares of Formula's stock were eventually sold, the majority of those shares (55%) would be voted in a block that was itself minority-controlled. Thus, such a voting trust agreement, if it were formalized, would have the effect of insuring control of Formula by minority group members even if the ownership of Formula's stock by minorities were to fall below 50%.

130. However, no formal agreement exists about the trust. WSCT Exh. 29, at 3.[16] While some of Formula's principals have discussed the use of the voting trust concept, there has never been a vote of the Formula shareholders applying a trust agreement. WSCT Exh. 29, at 2, 3.

Comparative Coverage (Issue 3)

131. While each applicant will serve areas and populations already receiving a minimum of five television signals, there is a divergence in the extent of their projected service areas. WSCT Exh.

[16] D. C. Code § 29–330 provides that a true voting trust agreement must be in writing and deposited with the corporation at its registered office.

17, at 2. The varying service areas and populations to be served within the Grade B contours of the seven parties will be as follows (*Id.*, at 5):

Applicant	*Population*	*Area (Square Miles)*
Grant	5,144,312	6,298
WSCT	4,997,204	5,280
WCTO	4,729,296	4,185
Capital	4,686,961	5,027
Century	4,680,566	4,970
WTI	4,638,173	5,116
Urban	4,377,704	4,523

Capital Communications' Failure to Reveal In Interrogatories Velez v. Devine Involving Diane Graham (Issue 5):

132. During the pendency of *Velez v. Devine*, Capital Communications was served with interrogatories. Interrogatory 12(a) of Grant requested that Capital:

> State whether any principal of Capital Communications of Washington, Inc. is or has been an officer, director, or principal at any time during the last five (5) years of an entity involved in, or the subject of, any legal proceedings before any court or administrative agency, or is currently the subject of any investigation or outstanding judgments or orders arising from such proceedings.

CapCom did not disclose the pendency of *Velez v. Devine* in its Answer to this Interrogatory. WTI Exh. 11, at 2. Ms. Graham testified that she decided not to disclose the *Velez v. Devine* proceeding because she did not consider herself a "principal, director or officer" of the Office of Personnel Management. Tr. 2820. She decided that only political leaders could be considered officers, directors or principals and not members of the career civil service—even of a high rank—whom she determined to be mere employees. Tr. 2822. Ms. Graham is a member of the Senior Executive Service of the Federal Government, which is considered a managerial position. Tr. 2842–43. *Velez v. Devine* specifically concerned her actions as the selecting officer in failing to hire Ms. Velez. WCTO Exh. 13. She did not, in preparing answers to Interrogatories, tell either other Capital Communications stockholders or its counsel about the *Velez* proceeding. Tr. 2839.

133. Ms. Graham denied having deliberately concealed the pendency of the *Velez* case because of its possible impact on CapCom's application. Tr. 2842. This must be viewed in light of the immediately preceding testimony at Tr. 2841–42:

> Q: Did you view the pendency of the [Velez] case as helpful or adverse to CapCom's application?
>
> A: I didn't view it in relation to CapCom's application either way.
>
> Q: Well, if the [Velez] case turned out badly for you, and there was a finding of

discrimination on your part, would that be helpful or adverse to CapCom's case?

A: I'm not in a position to say because I'm not making judgments on CapCom's case.

Q: All right, well, if there is a finding that you violated federal law, would you think that would be helpful to your application?

A: I am not the person making the decision on what is helpful and what isn't helpful.

134. After Judge Gesell's decision, the Capital Communications application was amended to report it. Tr. 2823. The record shows, however, that Judge Gesell's decision was reported in the newspapers. Tr. 2877, 2891. There would have been little opportunity to conceal it, given the large number of local residents involved in competing applications in this case, at least some of whom would be likely to "read the newspaper like everybody," as Ms. Farmer put it. Tr. 2891.

Conclusions of Law

135. *The Financial Qualifications of Century and Urban*: The Broadcast Bureau found that Century Communications required an additional $925,951 in order to meet its estimated construction and operation costs. At the hearing Century demonstrated that three of its stockholders had subscribed to bonds totaling $1,200,000. Pauline Wechsler and Dr. Herbert M. Wechsler have provided financial statements which show sufficient net liquid assets to fulfill their subscriptions. Dr. Everett J. Gordon has demonstrated that he has an available bank loan to meet his. Thus, Century has more than enough money to construct and operate.

136. The Broadcast Bureau also found that Urban had not provided reasonable assurance that it had available the $2,525,000 it needed for construction and operation. Urban made no attempt to correct the inadequacies in its financial plan until a few days before the hearing. Then, instead of reforming its original showing, it presented an entirely new plan for review. This plan relied on $1,250,000 from a lender called Ideal Opportunities Corp. of Miami Beach, Florida. It was evident that Ideal Opportunities was not an equipment manufacturer, or a financial institution, and therefore Urban was asked to establish the ability of Ideal Opportunities to lend it over a million dollars. Urban, during the course of the hearing, chose not to make a showing with regard to Ideal Opportunities and withdrew the letter from it.

137. In Urban's new proposal it also relies on a loan of $1,000,000 from the National Bank of Commerce (NBC), Washington, D. C. The Chairman of the Board of Directors of NBC, Jeffrey N. Cohen, testified at the hearing that NBC would lend Urban the money but that it would need to rely on other banks to provide

$510,000 of the loan. Mr. Cohen stated that NBC frequently relied on three correspondent banks to supply such funds individually, or in combination. The correspondent banks, however, he pointed out, would independently assess the borrower. In fact, Mr. Cohen had not shown any of the material that Urban had submitted to NBC to secure the loan to the other banks. It cannot be said that there is any assurance at all that NBC's correspondent banks would participate in a loan to Urban.[17]

138. In addition, it is evident that even the $490,000 which NBC could legally lend to Urban might be reduced by "points" totalling $70,000, and restricted by a yet undetermined method of repayment. (For example, Mr. Cohen also said that Urban might need to maintain compensating balances.) Given these uncertainties about what conditions will be exacted, there is no way of determining Urban's ability to meet them. Overall the loan from the National Bank of Commerce is not reasonably assured.

139. Although Urban also relies on equipment to be leased from Amvest Leasing Corporation, it did not demonstrate that Amvest has the ability to lease that equipment. Urban refused to present either relevant written material establishing Amvest's ability or an appropriate representative of Amvest to discuss the leasing letter sent by Amvest.[18] Currently, there is a letter from Amvest in the record but it is unclear whether Amvest has the ability to lease the equipment and what conditions Urban would have to meet if it did.

140. Urban estimates that it needs $732,840.35 to pay Amvest and meet its additional expenses. Urban Exh. 3, at 1. Aside from the fact that these claimed expenses are unsupported (the designation order states an entirely different amount), it means that, even if the Amvest loan is credited, Urban must rely on the unestablished one million dollar loan from NBC. And this is a loan which cannot reasonably be considered available to Urban.[19] Finally, Urban's financial showing also fails because it did not comply with the order to produce witnesses. Urban is financially unqualified.

141. *The Character Issues Involving Grant Broadcasting and*

[17] In the sole discussion Mr. Cohen did have with a correspondent bank, he led the correspondent to believe that Urban would rely on pay programs for its format and revenues. However, Urban had long since abandoned its pay television format when the discussion took place.

[18] It should be noted in this regard that Urban did attempt to make a late showing. While the comparative hearing ended on April 2, 1982, the request to present evidence was not made until July 7, 1982, over three months after Urban had been asked to make such a showing. In addition, Urban's proffer was subject to several conditions: the hearing had to be held the next day and the witness could only be interviewed by telephone. This request was denied because it would have been disruptive and it was unclear what showing Urban intended to undertake.

[19] Urban, as already noted, is now without counsel and its proposed findings, which were filed by counsel, are not clear on how even the most flattering review of the existing record gives Urban sufficient funds to meet its estimates.

Capital Communications: Grant Broadcasting has three stockholders, Milton Grant, who holds 50 percent of the stock, Lawrence Brailsford, who holds 25 percent, and Theodore Hagans, who holds 25 percent. Only Milton Grant and Lawrence Brailsford intend to work in the day-to-day operation of the station. Of these two integrated stockholders, Mr. Brailsford presents two qualitative attributes that Mr. Grant lacks: He is black and he lives in Washington, D. C.

142. However, Mr. Brailsford, in order to perfect his 25 percent interest and his integration credit, must have available $27,150. In July 1980, when he submitted his balance sheet, he stated he had cash on hand to pay the amount required. However, in July 1981, he declared bankruptcy and, in September 1981, he informed the bankruptcy court that his liabilities exceeded his assets.

143. When, in November 1981, Mr. Brailsford was asked in interrogatories in this case about his involvement in legal proceedings, the bankruptcy was not revealed. In November 1981, Mr. Brailsford also submitted a letter, as part of a response to a petition to enlarge, which indicated that he still had sufficient cash on hand to meet his commitment. His testimony indicates that that was not the case.

144. Mr. Brailsford attempted to excuse his apparent deception by explaining, at least initially, that he told the relevant members of Grant about his bankruptcy. But Mr. Brailsford's testimony at the hearing is inconsistent about his claim that he told Grant's counsel and its two other stockholders, Milton Grant and Theodore Hagans, about his bankruptcy. First he maintained he had not told them, then in some detail he explained how he had informed each of them, and finally he stated that he had not. Milton Grant, Grant Broadcasting's President, denies he was told when the November filings were made. In his testimony, Mr. Grant maintained that he had not known of Mr. Brailsford's bankruptcy until shortly before the hearing, in March 1982, when the matter was reported to the Commission. It is also evident from Mr. Grant's testimony, and Mr. Brailsford's, that Mr. Brailsford had been repeatedly told by Milton Grant how important it was to keep material information in the application accurate and to report any changes as soon as possible. While neither counsel for Grant nor Mr. Hagans testified, Milton Grant's testimony was consistent and creditable. In contrast, Mr. Brailsford's testimony was too inconsistent to be credited.

145. Mr. Brailsford appears to have deliberately withheld a fact, which he believed to be material to Grant's case, until another applicant in this proceeding called it to the Commission's attention. His deceptive actions are no better illustrated than by his attempt to alter a letter purportedly reaffirming his financial means to purchase his stock. He attempted to include his wife in the obligation, but he left the clear impression in the body of the letter

that the assets to be used were the same as those he promised before his bankruptcy. While it may have been a deception which was unnecessary, since Milton Grant stated that if he had known he would have lent Mr. Brailsford the money, the record demonstrates that Mr. Brailsford believed it was necessary.

146. The record also reflects that when Mr. Brailsford was informed that such information was called for in interrogatories, he did not reveal it. Moreover, Mr. Brailsford's deceptive testimony during the hearing lends credance to the conclusion that he intended to deceive the Commission. See *West Coast Media, Inc. v. F. C. C.*, No. 81–1548, D.C. CIR. decided December 7, 1982, at Slip Op. 5. Overall, his testimony on this issue is so contradictory and inconsistent that it is unbelievable and not entitled to any weight.

147. It has been stated often enough that the relationship between licensees and the Commission is one based on trust because of the necessity to rely on applicants and licensees to report relevant facts and to state events truthfully: Mr. Brailsford fails in both these respects.

148. His actions, moreover, are important in determining Grant Broadcasting's qualifications. He is a major owner of Grant Broadcasting; he is proposed for part-time integration in a position in which he is to represent the station before the public; and he is a director and officer. Grant Broadcasting has taken no steps to minimize his participation, and it is evident that as a principal of Grant Broadcasting his influence would be substantial. While there is no evidence that Milton Grant, the largest stockholder and the only stockholder to be integrated on a full-time basis, has not dealt truthfully with the Commission, he has taken no steps to insure that Brailsford's influence will not affect the public interest. Grant Broadcasting is, therefore, not qualified and will not be given comparative consideration.

149. The President of Capital Communications of Washington is Diane Graham. She is currently the Assistant Director of the United States Office of Personnel Management for Affirmative Action Programs. One of Ms. Graham's hiring decisions at OPM was found by the Federal District Court for the District of Columbia to have resulted in discrimination against one of the applicants, Roceliz Velez, because of her sex. Moreover, the reasons Ms. Graham gave to justify her actions were not given any weight by the court because her testimony was inconsistent and contradictory

150. However, this incident stands out in her professional record as an anomaly. Her overall hiring record at OPM demonstrates a superior devotion to equal employment opportunity. Her own office, for which she bears hiring responsibility, has had an improved level of hiring and promotion in all job categories. Moreover, the number of women employed in her office far exceeds the level of female employment in the federal government as a whole. At the manageri-

al level, employment of women in her office exceeds the government average by eight times. Thus, aside from the single incidence of discrimination cited in this case, there is no other evidence that establishes that Ms. Graham discriminates on the basis of sex. The contrary is true, she has enhanced equal employment opportunity. This incident should not disqualify Capital and it is of no comparative importance in light of the weight to be attributed to Ms. Graham's other hiring decisions.

151. *The 307(b) Issue: Arlington, Virginia vs. Washington, D. C.*: This proceeding began with thirteen applicants, twelve applied for Washington, D. C. and one, Urban Telecommunications, applied for the Washington suburb of Arlington, Virginia. Urban is not financially qualified and it never did make an acceptable showing that Arlington should receive a 307(b) preference. Nevertheless, its assertion warrants discussion. The claim that Arlington should have its own commercial television channel is similar to the claim recently considered in *Cleveland Television Corporation*, 52 Radio Reg. (P&F) 2d 581, 586–87 (Rev. Board 1982) that the Cleveland suburb, Shaker Heights, should prevail over Cleveland, and it requires the same resolution. Urban proposes to serve essentially the same area and population as the other applicants. The record reflects that Urban's transmitter would be located in Washington, D. C. and that Urban views the whole Washington area as being the audience and support for the station. Moreover, Arlington, like Shaker Heights, is a contiguous suburb that represents only a part of the Washington, D. C. community.

152. In this setting, to accept the claim that an applicant for Arlington would provide a more fair and equitable distribution of Channel 14 would raise form over substance. The reality is that Urban would use Section 307(b) as a procedural device to gain a preference and it would then use the allocation to provide service to the same community as the other applicants. The record reflects it has no ties to Arlington. Its only stockholder lives in Washington, D. C., its transmitter would be in Washington, D. C., and its financial proposal to its backers has been on the basis that it would serve the Washington, D. C. television market. Section 307(b) is not of decisional significance in this case. *Id.*

153. *Diversification of Control of the Media of Mass Communications*: Of the five qualified applicants none hold media interests. While some of the principals in various applications have media interests, these media interests are not large and present no ground for comparative consideration; they are *de minimis*. *Gainesville Media, Inc.*, 70 F.C.C. 2d 58, 64 (Rev. Board (1978)). WCTO has no media interests and its officers, directors and board members have none. Century has no media interests and its stockholders have stated they would divest themselves of any existing interests they

now hold. The principals of Capital Communications, like WCTO, have no media interests.

154. Washington Television has two stockholders that have broadcast interests. Lonnie Murray owns 13 percent of a radio station in New Orleans and John F. X. Browne holds 1 percent in a company that operates two television stations in Michigan.[20] Neither Mr. Browne nor Mr. Murray control the entities in which they have an interest and the stations are located a substantial distance from Washington, D. C. While Mr. Browne's television interest is of no consequence, Mr. Murray's radio station warrants a very slight demerit.

155. WSCT's Lewis Rivlin, who holds only a 4.59 percent interest in the applicant, also owns 25 percent of a company that holds a 10 percent interest in three cable systems that are 400 miles or more away from Washington. Mr. Rivlin's derivative interest is 2.5 percent in one system, located in Portland, Maine, and 2.19 percent in the two other systems, located in South Carolina. Mr. Rivlin lacks the possibility of any control over WSCT and his interest in the cable systems is very small. Moreover, the cable systems are some distance from the Washington, D. C. service area. As a practical matter his cable ownership is too small and remote to warrant any comparative demerit. See *New Continental Broadcasting Company*, 88 F.C.C. 2d 830, 851 (Rev. Board 1981). The cable television interests in *New Continental* were assigned a very minor demerit. However, it is apparent that Mr. Rivlin's holdings are significantly smaller and more remote than those held in *New Continental* and, therefore, no demerit is warranted.[21]

156. *Participation in Station Operation by Owners*: The deciding factor in this case is the preference to be granted when an applicant promises that owners will actively participate in the day-to-day operation of the station. There are differences between the applicants in the quantitative participation promised, and to a lesser extent, in the quality of the persons who will participate. The level of participation promised by WSCT-TV is the highest of all applicants.

157. The Commission is "primarily interested in full-time participation." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d, 393, 395 (1965). "[N]o credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." *Id.* Positions are

[20] Mr. Browne's media ownership is attributable for comparative purposes although the stations have since been assigned. See *Order*, FCC 82M-3669, released November 19, 1982, granting Washington Television's amendment notifying the Commission of the assignment.

[21] If Grant and Urban were considered they might each receive a slight demerit for their media holdings. Mr. Grant because of his interest in a Texas television station and Urban because of Mr. White's new interest in a Nashville, Tennessee construction permit.

assessed in terms of the role they play in policy formation and station management. Other positions will be of diminished credit. *Id.* An owner's residence and relevant broadcast experience strengthens a proposal, but local residence is more important than broadcast experience.

158. George C. Corbin, Thomas A. Farrand, Armando B. Rendon, Bill E. Tucker, and Van F. Alexander are all officers of WSCT-TV and its parent corporation, Formula Communications, and their collective ownership interest is 77.64 percent. Each would play an important role in the management and operation of the station on a full-time, daily basis. George Corbin, who is a 36.72 percent owner, would be the General Manager; Thomas Farrand, who is a 13.77 percent owner, would direct programming activities; Armando Rendon, who is a 11.47 percent owner, would be the Station Manager; Bill Tucker, who is a 4.61 percent owner, would be the Sales Manager; and Van Alexander, who is a 11.47 percent owner, would be the Director of Public Affairs.

159. Their quantitative integration is enhanced by their qualitative attributes. All live in Washington, D. C., but Mr. Tucker, who would move to Washington. In addition, Messrs. Farrand, Rendon, and Alexander have exhibited participation in community affairs. Each of them have had relevant television experience, and some of that experience has been in the Washington, D. C. market. In addition, Messrs. Corbin, Tucker, and Alexander are black and Mr. Rendon is Hispanic. Overall, minority group members, who will work full time at the station in management, own 64.27 percent of the applicant.

160. WSCT-TV's proposal is further enhanced by the part-time (20 hours per week) integration of a woman, Amy Gilbert, who owns 13.77 percent of the applicant and would be the Business Manager, or Comptroller. She also lives in Washington, D. C. When her participation is considered, WSCT-TV proposes integration into management, on a full-time and part-time basis, persons who own 91.81 percent of the applicant. And, of this group, minorities and women hold a 78.04 percent interest in WSCT-TV. This becomes particularly important when it is remembered that the Washington, D. C. area has a large Hispanic and black population.

161. The competing applicants have argued that the total ownership by these principals would be reduced by the possibility of future stock holdings of the Syncom Capital Corporation. WSCT-TV has indicated that it might borrow from Syncom to finance its application. The agreement between WSCT-TV and Syncom provides that under certain circumstances Syncom could become one of the owners of Formula, WSCT-TV's parent. However, the potential Syncom interest is too uncertain to attribute an ownership interest to it.

162. WSCT-TV does not rely on the potential loan from Syncom

and it has not indicated whether it will borrow the money from Syncom. Moreover, even if it did, there is no reason to assume that Syncom would become a Formula stockholder. While, if Formula borrows from Syncom, Syncom would become the holder of warrants that could be converted to Formula stock, Formula retains the right to have Syncom return the warrants in exchange for their fair market value. And Syncom has the right to simply cash in the warrants. These rights apply from the fifth to the tenth year after the loan is made. Sycom's ownership is at this stage conjectural. There is no evidence that Formula will decide to borrow the money and, moreover, that if it does, the loan will result in Syncom owning Formula stock.[22]

163. In addition, the competing parties have argued that WSCT-TV's principals have formed a voting trust which essentially withdraws ownership power for the shares placed in the trust. While WSCT-TV principals have discussed a voting "trust," none has actually been formed and no voting through a trust has resulted. The trust, if ever formed, is intended to preserve the existing control of Formula, and therefore, WSCT-TV, by minorities. This is particularly reassuring since control of ownership by minorities is a factor in awarding WSCT-TV a substantial and decisional preference for its integration proposal. *Gilbert Broadcasting Corporation*, 52 Radio Reg. (P&F) 2d 429, 444 (1982).

164. The bona fides of Mr. Rendon's full-time and Ms. Gilbert's part-time proposed integration has also been challenged. The assertion is that Mr. Rendon, because he has stated he would practice law when he graduates from law school, and Ms. Gilbert, because she has an active career as a CPA, would not fulfill their proposed obligation. There is no evidence that Mr. Rendon would practice law if a grant is made to WSCT-TV, or that if he does that he would not be able to fulfill his commitment. Nor is there any evidence that Ms. Gilbert could not adjust her CPA practice to spend 20 hours per week with WSCT-TV.[23]

165. Finally, there is no merit to the claim that Mr. Rendon's position is at variance with the application. While the title of Station

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[22] WSCT-TV's parent, Formula, in a separate agreement has borrowed $10,000 from Syncom to finance the development of syndicated programming. That agreement, dated January 14, 1981, restates Syncom's right to purchase warrants and participate in the facility applied for here on the terms outlined in Syncom's original December 17, 1980 commitment letter to Formula. Contrary to the claims of the competing parties, this recent borrowing does not establish that Formula has decided to borrow the funds or that Syncom now has a right to the warrants.

[23] The further claim that she would not spend 20 hours a week because there would be insufficient work is an improper inference to reach from the fact that she stated the work would take more time in the beginning.

Manager, was later applied to his functions, Mr. Rendon's role has remained the same.[24]

166. Nor has there been a change in Mr. Alexander's title. Mr. Alexander's corporate title in WSCT-TV, Inc. is Vice President, Corporate Relations. WTI Exh. 4, at 2. In the staffing proposal, WSCT-TV provided for a Public Relations Manager. WTI Exh. 7, at 2. From this the parties construct their variance claim. Such an argument is without merit.

167. From the outset, Mr. Alexander has understood that his role would be in the public relations area. Tr. 2032. As a public relations official, Mr. Alexander's duties will involve the station's external relations. Tr. 2035. Thus, he will have a position that is differentiated from Armando Rendon's position which deals with internal station matters. Tr. 2035–36.

168. Washington's Christian Television Outreach also proposes a significant amount of participation in station operation by the board members of its non-profit, non-stock corporation. WCTO is controlled by its Board of Directors and corporate decisions are made by a majority vote of the Board. Eight of the ten Board members propose to work at the station and WCTO would attribute to each director a 20 percent share in the corporation. The President of WCTO, A. Bert Carver, proposes to work full time as the station's General Manager. The other seven integrated directors would also work full time. Dr. Wendell P. Witten is proposed as Program Production Manager, Elaine H. Witten as Program Manager, Dr. Lucas H. Blevins and Jean H. Blevins as Co-Managers of Counseling, Reverend Charles R. Hayes as Public Relations Director, Joe-Ann Hayes as News Director, and Julia F. Carver as Marketing Director. All live in the Washington area, Elaine and Wendell Witten and Joe-Ann and Charles Hayes are black, four of the eight are women, and Mr. Carver is part Cherokee Indian (his mother had both an Indian father and mother). Mr. Carver, Ms. Carver, Dr. Witten, Dr. Blevins, Ms. Blevins, Rev. Hayes and Ms. Hayes have participated in local civic activities.

169. All of the integrated directors of WCTO have participated in one or two religious television programs broadcast in Washington, D. C. on Channel 20, WDCA. None of them has been employed by a broadcast station in a managerial position. Their jobs with regard to

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[24] Mr. Rendon was originally listed as the Corporate Relations Director in WSCT-TV's staffing proposal in its application. Mr. Rendon testified that he foresaw his functions under that title as one where he would work with "all the other divisions or departments in the station." Tr. 1964. It is evident that while the title of his position now includes the traditional description of Station Manager, his function in the WSCT-TV proposal has remained the same. WSCT-TV had little incentive to vary Mr. Rendon's job by supplying a more common title to it since the *Comparative Policy Statement* is concerned with function not form and none of the competing parties have demonstrated that there has been a variance of function.

Channel 20's religious programs were on a volunteer basis and the work they performed ranged from "assisting production" to performing or participating as talent on the programs.

170. If all of WCTO's proposed integration is credited, it would have 80 percent full-time integration. Some of the parties have objected to crediting the Blevins with a management position since they are essentially going to assist each other in the same job of managing and training volunteers during an evening call-in program. These positions are undoubtedly significant to the production of the program they will be associated with, but it is clear that they will not play an important role in the station's management. In fact, there appears to be no policy function to their role and Dr. Blevin's testimony indicates that his daily time at the station will equal no more than two hours. *New Continental Broadcasting Company*, 88 F.C.C. 2d 830, 839 (Rev. Board 1981), *application for review to the Commission*, filed January 29, 1982. Moreover, their role is a shared function, essentially one job split in half, which means that any influence they exert on the station would not be as great as if they had responsibility for separate station operations. This does not mean that the Blevins should not be given credit for their participation, but it does mean that it is reduced in importance. In this regard WSCT offers a greater degree of full-time integration. And whether or not the Blevins are given full quantitative credit, WSCT-TV proposes, overall, a greater amount of integration.

171. Qualitatively, WCTO proposes the participation of more women than WSCT-TV (women represent 40 percent of WCTO and 13.77 percent of WSCT-TV) but WSCT-TV proposes more integration of minorities (integrated minorities represent 64.27 percent of WSCT-TV and 50 percent of WCTO). Aside from these percentages, however, there is a significant difference because WSCT-TV is controlled by minorities. This is not the case with WCTO's representation of women or minorities. WSCT-TV also proposes that the station will be operated by blacks with significant television experience which directly relates to the management of the proposed station. WCTO's directors have not had any broadcast experience that warrants similar credit. WSCT-TV is to be preferred over WCTO on both quantitative and qualitative grounds.

172. Washington Television proposes that two of its stockholders would operate the station. Dr. Joann Anderson would work full time as the General Manager and Lonnie Murray would work full time as Program and Operations Manager. They both live in the Washington, D. C. area, Dr. Anderson has participated in a civic activity, and Mr. Murray and Dr. Anderson have assisted in the management of radio stations. They are black and Dr. Anderson is a woman. However, they own only 70.1 percent of the applicant, which is not as great a percentage of ownership as that proposed by WSCT-TV or WCTO. Washington Television is qualitatively nearly the same as

WCTO, but it is not as strong on relevant experience and civic participation as WSCT-TV.

173. Capital Communications proposes significant integration, but most of it is part time. Karen Brown, Margaret Johnson, and Nancy McCormick-Pickett, each of whom can be credited with 11.11 percent ownership, represent proposed full-time management. Yetta W. Galiber, A. Diane Graham, Thelma Mullin, Lili Packer and David Pales would work twenty hours per week at management positions and their ownership interests total 55.55 percent. All but one stockholder are women, three are black, and the only male stockholder is Hispanic. The stockholders in this group have been very active in local civic affairs, and all have been long time local residents. In these respects they are qualitatively equal to those applicants that have promised more full-time integration. They do not, however, present the same quality of broadcast experience as WSCT-TV.

174. Century's integration proposal is also weaker than the other applicants' on quantitative grounds. Steven Wechsler, who is a 15.57 percent stockholder, is the proposed full-time General Manager. Diane Wechsler, who is a 10.46 percent stockholder, proposes to work full time as Customer Service Manager. And Charles Bennett Fisher, who is a 2.70 percent stockholder, proposes to work full time as Director of Community Relations and Special Affairs. All three live in the community. Mr. Fisher has been active in civic affairs and he is black, and Ms. Wechsler is a woman. Although they do not have broadcast experience, Mr. Wechsler operates a movie subscription service which is distributed by microwave.

175. Century proposes that two of its stockholders would work 30 hours per week and that six other stockholders would work 20 hours. Peter Yeskel, who is a 13.35 percent stockholder, proposes to spend an average of 30 hours on the duties of Secretary-Treasurer and Chief Financial Officer. Mr. Yeskel stated, however, that his commitment was not to the day-to-day operation and that the time he would spend would depend on other problems he might have with his other business interests. During some weeks, he believed, he might spend as little as ten hours. His day-to-day commitment is, therefore, uncertain and cannot be credited. On the other hand, the 30 hours proposed by Eugene Aikens, Jr., who holds 6.67 percent of Century's stock, is definite. He is proposed as the station's Personnel Director. Mr. Aikens is black and he lives in Washington, D.C.

176. Of the people who would spend twenty hours a week, only slight credit can be given for Pauline Wechsler, who owns 19.80 percent of Century's stock, because she stated she would not be involved in the day-to-day management of the station. Instead, she merely plans to represent the station at community functions. The remaining stockholders, who propose to work 20 hours per week, would only participate in a limited way in the development of day-to-

day station policy. Dr. Everett J. Gordon, who is a 3.56 percent stockholder, would act as the station's contact for community groups; Claudia R. Rayford, who is a 1.78 percent stockholder, would serve as a "link" between the Director of Advertising and Marketing and the General Manager; Dr. Frances Rankin, who is a 2.67 percent stockholder, plans to develop children's programming (two are planned); Edna R. Jones, who is a 1.78 percent stockholder, would supervise implementation of consumer programming; and Brenda Gladden, who is a 4.45 percent stockholder, would work as house counsel and be involved in non-entertainment programming. While all of these part-time participants have qualitative attributes, the quantity of ownership and the jobs they would perform does not raise Century's proposal to a level that is equal to the other applicants.[25]

177. *Auxiliary Power Source and Comparative Coverage*: WCTO and Century claim a preference for their proposal to install auxiliary power. The Commission has provided that auxiliary power equipment is "a factor of decisional significance in comparative AM and FM broadcast proceedings." *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 F.C.C. 2d 667, (1966). The Commission has made no provision for television proceedings and therefore, WCTO and Century's request for a preference must be denied.

178. The claim of WSCT-TV and Grant Broadcasting for preference based on coverage is also without merit. All proposed coverage areas now receive Grade B coverage from a minimum of five signals. While there are population differences in the areas covered by the applicants, the coverage evidence submitted does not identify the number of signals received by the population which is exclusive to WSCT-TV and Grant, which claim superior coverage. In part this is the case because only the minimum number of signals are identified and not the maximum. No preference can be accorded in light of the showing made.

179. *Capital Communications' Failure to Report Diane Graham's Involvement in VELEZ V. DEVINE*: While the sex discrimination case of *Velez v. Devine*, involving the hiring decision of Capital's principal, Diane Graham, was pending, Capital was asked if any of its stockholders were principals in an entity that was involved in, or the subject of, litigation. Capital did not report the sex discrimination case involving Ms. Graham. Ms. Graham testified that she did not view herself as a principal of the Office of Personnel Management. She believed that principals would be political appointees. She formed this conclusion despite the fact that she is a member of the Senior Executive Service of the Federal Government and holds the title of Assistant Director of the United States Office of Personnel Management for Affirmative Action Programs. In the common use of the word principal, there can be little doubt that the distinction she drew was unwarranted.

180. Once Ms. Graham decided on her own that she was not a principal she did not reveal the discrimination case involving her to other Capital stockholders or its counsel. However, once the case was publicly known Capital Communications did report the case because, of course, it did involve Ms. Graham, who is Capital's President. It is apparent that Ms. Graham was not fully candid about a matter that could have affected Capital's case. Her view that she was not a principal in the *Velez v. Devine* case is simply not creditable, particularly since Capital did report the case when it became publicly known. Because Capital did ultimately report the case and its impact has been considered, this issue does not rise to a level warranting disqualification. But Ms. Graham's withholding of information about the case greatly lengthened the time required for this hearing and demonstrated lack of candor and an unwillingness to reveal potentially harmful facts. A comparative demerit against Capital is required on this issue.

Summary Evaluation of the Applicants

181. Grant Broadcasting and Urban Communications are not entitled to comparative consideration because they have been unable to establish their qualifications. Grant Broadcasting is unqualified because of the deception its principal, Lawrence Brailsford, undertook to keep the Commission from learning of his bankruptcy. Urban Communications has not established its financial qualifications and it has refused to cooperate in the examination of its finances. The remaining five applicants are qualified and none have media interests that affect the outcome of the case. Only Lonnie Murray, a principal of Washington Television, has an interest that requires comparative recognition, and that interest requires only a very slight demerit.

182. The area of significant difference is in the promises the applicants have made to have owners operate the proposed facility. Of those promises, that made by WSCT-TV would best serve the public interest. Its proposed full-time and part-time integration is 91.81 percent. In addition, WSCT-TV is controlled by minority members who will work at the station in management positions. Those who will be integrated are, with one exception, already living in the community, most of the integrated stockholders have a high degree of relevant broadcast experience, and most of them have been active in area civic affairs.

183. In second place is WCTO. Its proposed integration is 80 percent. But two stockholders, Dr. Lucas H. Blevins and Jean H. Blevins, who represent 20 percent of the WCTO integration proposal, would not perform the same level of day-to-day management participation as the other integrated Board members. It is also evident that the Blevins would not occupy positions as responsible as those jobs that will be undertaken by WSCT-TV's principals. But

more importantly, WSCT-TV will be run and controlled by minorities and a woman, who represent nearly eighty percent of its ownership.

184. Because they have proposed lesser amounts of integration than WSCT-TV and WCTO, the remaining parties would be ranked as follows: Washington Television, Inc., Capital Communications and Century Communications. In addition, Capital Communications would receive a moderate demerit because it did not report, when it arose, the litigation involving its principal, Diane Graham.[25]

ACCORDINGLY, IT IS ORDERED that the petition for leave to file out of time, filed August 3, 1982 by Grant Broadcasting Corporation IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed November 18, 1982 by WSCT-TV, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend filed January 5, 1983 by Washington Television, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that Urban Telecommunications Corporation's motion for leave to amend filed January 10, 1983 IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion for leave to file supplemental pleading and supplemental conclusions of law of Washington Television, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the application of WSCT-TV, Inc. (File No. BPCT-800118KP) for authority to construct a new commercial television broadcast station on Channel 14, Washington, District of Columbia IS GRANTED and the applications of Washington's Christian Television Outreach, Inc., Century Communications, Inc., Capital Communications of Washington, Inc., Grant Broadcast-

[25] Although Grant Broadcasting's proposal has not been compared, if it had been it would not have prevailed since Grant's full-time integration is only 50 percent and its part-time is 25 percent. Moreover, this assessment assumes no comparative consideration would be given to Mr. Brailsford's failure to report his bankruptcy. If Urban Communications were qualified, it too would not prevail. While Urban Communications proposes the full-time integration of its sole stockholder, Theodore R. White, this would amount to only slightly more integration than the 91.81 percent that is proposed by WSCT-TV. This difference is *de minimis*, however, when compared to WSCT-TV's proposal which, unlike Urban, includes significant broadcast experience and participation in local civic affairs.

ing Corporation, Urban Telecommunications Corporation, and Washington Television, Inc. ARE DENIED.[26]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN, *Administrative Law Judge*

[26] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Coverage, Issue, See Also Comparative Coverage Issue
Diversification, of Control of Mass Media, See Also Control
Site Availability

In hearing matter of mutually exclusive CP applications for new FM station, Review Board affirms ALJ's grant. Winning applicant found to be financially qualified and entitled to diversification, coverage, and auxiliary power preferences. Petition for a site availability issue denied.
–*White Mountain FM, Inc.*
BC Docket No. 82–629

FCC 83R–58

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WHITE MOUNTAIN FM, INC. Littleton, New Hampshire	BC Docket No. 82–629 File No. BPH-810408AC
PROFILE BROADCASTING COMPANY, INC. Littleton, New Hampshire	BC Docket No. 82–630 File No. BPH-811027AL
For Construction Permit for a New FM Station	

Appearances

Julian P. Freret and *Christopher D. Imlay* for White Mountain FM, Inc.; *David Tillotson* and *Mania K. Baghdadi* for Profile Broadcasting Company, Inc.; and *Robert A. Zauner* for the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: August 22, 1983; Released: August 26, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. In this comparative case involving a new FM broadcast station in Littleton, New Hampshire, Administrative Law Judge Edward J. Kuhlmann awarded the construction permit to White Mountain FM, Inc. *See Initial Decision* (FCC 83D-17) (*I.D.*), released March 11, 1983. White Mountain was awarded a substantial preference on the

diversification criterion because its opponent, Profile Broadcasting Company, Inc., is the licensee of Littleton's only commercial radio station, WLTN(AM), whereas White Mountain owns no other media interests. White Mountain was also given credit for auxiliary power, and received a slight preference for providing a second aural service both during the day and at night. Profile has filed exceptions in which it argues that the ALJ erred in failing to add a financial issue against White Mountain, and that he should have awarded Profile a moderate preference for comparative coverage and a substantial preference for integration. After review of the record and briefs, we affirm the *I.D.* in all major respects.

2. *White Mountain's Financial Qualifications.* The *Hearing Designation Order* stated that White Mountain's application did not demonstrate its financial qualifications; that the Commission's new Form 301 required only a certification as to financial qualifications; and that White Mountain would be given 30 days to review its proposal, make any necessary changes, and, if appropriate, submit a certification to the ALJ. If it could not make the certification, the ALJ was authorized to specify an appropriate issue. This procedure was modeled on the Chief, Broadcast Bureau's (now Mass Media Bureau) designation Order in *Minority Broadcasters of East St. Louis, Inc.*, Mimeo No. BC5092, released July 15, 1982.

3. In its exceptions, Profile states that on October 4, 1982, White Mountain certified to its financial qualifications but failed to indicate what changes, if any, it had made in its financial proposal which permitted it to so certify. Believing that White Mountain's certification should not be credited in the absence of such information, Profile requested the ALJ to add a financial issue against White Mountain. The ALJ declined to do so, Tr. 3, and Profile excepted to this ruling. Oral argument on May 26, 1983 was focused exclusively on this matter. Subsequently, however, on June 2, 1983, the Commission released a Memorandum Opinion and Order in *South Florida Broadcasting Co., Inc.* (FCC 83–255) which overturned the Bureau's *East St. Louis* policy because it applied the certification procedure in a manner inconsistent with its intent. The Commission thereupon ordered all applicants in hearing status who initially filed under the old Form 301 but subsequently established their financial qualifications by certification to make the full documentary showing required by the old form within 30 days and authorized the specification of an appropriate issue if an applicant could not so demonstrate its financial qualifications. *Id.*

4. In accordance with *South Florida*, White Mountain, on June 22 1983, submitted a detailed financial amendment intended to establish its qualifications. According to the information furnished, White Mountain will need $138,959 to meet its costs of construction and first three months of operation. For funding, it relies on the net proceeds of a loan from The Saver's Bank, in Littleton, of $123,200, a

net deferred equipment credit of $43,124, cash on hand of $169, and a $10,000 contribution from its principals, Thomas M. and Kathleen G. Pancoast. While the Pancoast's balance sheet of June 1, 1983 shows sufficient net liquid assets from which they could advance $10,000, the applicant has not complied with the requirement that it furnish the agreement obligating them to do so and showing the terms of the commitment. *See* Form 301, Section III, Page 3, Item 4a. While this may have been simply an oversight, it appears that the applicant is financially well qualified even without reliance on these funds since it has a "cushion" of other funds over costs of almost $28,000. Profile has not challenged White Mountain's documentation and it appears that no financial issue is warranted, no material questions of fact being evident. Profile's financial exceptions are therefore denied.

5. *Comparative Issue: Coverage.* White Mountain was given a preference based on findings that it would provide a second aural service during the day to 1,258 persons, as compared to 218 by Profile, and a second aural service at night to 3,150 persons compared to 397 by Profile. While Profile would serve more persons overall in a slightly larger area, the ALJ noted that this population already has at least three services. *I.D.*, para. 14. Profile argues that it should receive a moderate coverage preference because its service area is 6.4% larger and contains 29.5% more people than the area that would receive primary service from White Mountain. *Br.* at 8.

6. The ALJ's award of a modest preference to White Mountain was a correct resolution of the coverage factors in this case. The Commission has traditionally placed greater emphasis on the provision of a first or second broadcast service than on superior overall coverage to areas and populations that cannot reasonably be said to be underserved. *Compare, e.g., Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976), *rev. denied*, FCC 76–597, released June 24, 1977 (decisive preference to applicant proposing first and second primary services, *with Wolverine Radio Co.*, 49 FCC 2d 1038 (Rev. Bd. 1974), *rev. denied*, FCC 75–985, released September 12, 1975 (slight preference to applicant for provision of new service to 21,000 more persons than its opponent); *see also Barnes Enterprises, Inc.*, 69 FCC 2d 1957 (Rev. Bd. 1978), *rev. denied*, FCC 79–451, released July 19, 1979, and cases cited therein. Profile has cited no supporting precedent at all, let alone a case involving comparable facts, where a preference was awarded to the applicant in its relative position. On the contrary, the law is clear that provision of a second primary aural service is a "factor of considerable importance" and should result in a preference. *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982) (moderate preference awarded), *rev. denied*, FCC 83–320, released July 7, 1983; *see also Town and Country Radio, Inc.*,, 70 FCC 2d 572, 575 (Rev. Bd. 1978) (moderate preference awarded). Thus, White Mountain receives a preference for providing this additional service both during the day and at night. Its

preference is a modest one, however, because the absolute numbers of additional persons it will serve are not as large as in the cited cases, and the additional overall population coverage by Profile is not inconsiderable. In view of these factors, we believe the ALJ prudently avoided overstating White Mountain's advantage but that the preference it received should be adjusted somewhat and be labeled as slight to moderate.

7. *Participation of Ownership in Management.* Kathleen G. and Thomas M. Pancoast each own 50% of the stock of White Mountain and each intends to work 40 hours a week at the proposed station in various management positions. Likewise, Profile's shares are jointly held by Peter C. and Judith F. Aydelott and each of them proposes to work full-time in management roles at the station. The applicants differ somewhat in terms of their qualitative enhancements but in view of their 100% full-time quantitative integration proposals, the ALJ found them to be nearly equal and did not award either one a preference. *I.D.*, paras. 12, 13, 15. Profile excepts to the award of full-time credit to Mr. Pancoast on the ground that his plan to continue working part-time as an attorney will conflict with his proposed role at the station. It urges award of only part-time credit for his role and a resulting substantial preference to Profile because of the difference between its 100% full-time proposal and White Mountain's reduced 50% full-time and 50% part-time proposal.

8. We affirm the ALJ's award of full credit for Mr. Pancoast's proposal. Mr. Pancoast testified that if the White Mountain application is granted he would reduce the 25 hours per week he now spends in his law practice to 10 to 15 hours per week and would also resign his position as a Master of the New Hampshire Superior Court where he now works two days a week. *I.D.*, para. 6; White Mountain Exh. 5. Mr. Pancoast's testimony is uncontradicted and unrebutted. Where, as here, a principal's integration proposal is set forth in some detail and he has specifically allocated his time so as to accommodate his outside interests in order to effectuate his proposal, we may conclude that the applicant has demonstrated the necessary assurance that its proposal will be carried out. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982); *Bradley, Hand and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969). Profile's exception does not cite to any record evidence or case law for support but relies instead on bare speculation. This, of course, is an insufficient basis for over-turning the ALJ's conclusion. We affirm the ALJ's conclusion that Mr. Pancoast should be fully credited and that the applicants are virtually equal because of their comparable 100% integration proposals.

9. *Petition to Reopen.* On June 15, 1983, Profile requested reopening of the record and remand on new issues to determine whether the transmitter site specified in White Mountain's applica-

tion is available to it; if the site is unavailable, whether White Mountain lacked candor or misrepresented in claiming the site was available; and the impact on White Mountain's qualifications. Profile contends that White Mountain cannot obtain access to its proposed transmitter site on Mann Hill because only one road provides access to that site. The road traverses private property owned by Roy and Barbara Hendrickson, and is subject to a restrictive easement which allegedly precludes White Mountain's use. Specifically, the easement allows access to use the road to the University of New Hampshire in order to maintain and operate educational television station WLED-TV from the site on Mann Hill. The easement is intended for this purpose only, Profile asserts, and the Hendricksons will not permit the road to be used by White Mountain or anyone else for any other purposes. Thus, Profile argues, a substantial question exists as to the site's availability.

10. In support of a candor issue, Profile asserts that White Mountain failed to ask the Hendricksons about using their road for access to the transmitter site, and that this is "tantamount to a failure by White Mountain to make any inquiry as to the availability of its proposed transmitter site." *Petition* at 7. Accordingly, since White Mountain never had reasonable assurance of the availability of its transmitter site, Profile argues that a misrepresentation or lack of candor issue is also warranted.

11. In opposition, White Mountain contends that it has both reasonable assurance of, and access to, its proposed transmitter site on Mann Hill, and that allegations of misrepresentation and lack of candor made by Profile are without merit. In support, White Mountain attaches the statement of William Ingalls, the transmitter supervisor for the WLED-TV site, who states "I know Thomas M. Pancoast of Littleton, New Hampshire. I met him as a result of his seeking and obtaining our reasonable assurance to allow White Mountain FM, Inc. to utilize the television tower of our WLED-TV on Mann's Hill in Littleton for the purpose of transmitting the signal of its proposed FM station." White Mountain also responds that it is not dependent upon the Hendrickson property for access to the transmitter site because another property owner, Daniel Edgar, will allow White Mountain access to the site over his land, or if that fails, a helicopter can be used to scale the mountain. In an attachment, Mr. Edgar states: "Existing logging roads on our property furnish access to the common boundary between our property and that of the State of New Hampshire" and that White Mountain is "welcome to cross our property to and from the property of the State of New Hampshire for the purpose of installing and maintaining an FM radio transmitter and antenna on the property of the State of New Hampshire, and to improve and maintain any roads on our property necessary for this purpose. . . ." Finally, as to the issue of

misrepresentation or lack of candor, White Mountain denies any knowledge of the existence of the Hendrickson easement.

12. The Board will not reopen the record to add site availability and misrepresentation or lack of candor issues against White Mountain. It is evident from the statements supporting its opposition pleading that White Mountain has had, and continues to have, reasonable assurance of its proposed transmitter site and of likely access to it. Although Profile replies that access is still in question and submits a supporting statement from John Keller, a forester, who conducted an aerial survey of Mann Hill to show that no truck-traversable road exists on the Edgar property that would allow access to the proposed site, this is an insufficient basis for addition of an issue. First, we have previously held that the mere fact that there are no present roads to a proposed site does not preclude the future construction of a road or the possibility of access to the site over existing barren land. *Charles Vanda*, 4 RR 2d 543 (Rev. Bd. 1965) (site issue denied). Secondly, the property owner who is affording White Mountain access to its proposed site, Mr. Edgar, has expressly given his permission for White Mountain to develop whatever roads are necessary for access to the site. And finally the applicant has even considered the possibility of airlifting its transmitter and associated equipment to its site if all other means of access fail. We also find that Profile's allegations of misrepresentation or lack of candor against White Mountain are baseless. White Mountain's claimed lack of knowledge of the Hendrickson easement at the time it specified the Mann site is not disputed by Profile, nor is its reasonable assurance of use of the Mann site itself challenged. The only question is that of access to the site and we find no factual questions relating thereto that warrant further evidentiary proceeding. One way or another, it appears, White Mountain will gain access to its site.

13. *Summation.* White Mountain has been found financially qualified and no basis for reopening the record to examine new issues has been shown by Profile. Comparatively, White Mountain is clearly superior, having an undisputed substantial diversification preference, a slight to moderate coverage preference, and an auxiliary power preference. A grant of White Mountain's application will serve the public interest, convenience and necessity.

14. ACCORDINGLY, IT IS ORDERED, That the petition to reopen the record and enlarge issues, filed June 15, 1983, by Profile Broadcasting Company, Inc., IS DENIED; and

15. IT IS FURTHER ORDERED, That the application of White Mountain FM, Inc. (File No. BPH-810408AC) for a construction permit for a new FM station on Channel 292A at Littleton, New

Hampshire, IS GRANTED, and that the application of Profile Broadcasting Company, Inc. (File No. BPH-811027AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WHITE MOUNTAIN FM, INC. Littleton, New Hampshire	BC Docket No. 82–629 File No. BPH-810408AC
PROFILE BROADCASTING COMPANY, INC. Littleton, New Hampshire	BC Docket No. 82–630 File No. BPH-811027AL
For Construction Permit for a New FM Station on Channel 292A Littleton, New Hampshire	

Appearances

Julian P. Freret and *Christopher D. Imlay* for White Mountain FM, Inc.; *David Tillotson* and *Richard Narvaiz* for Profile Broadcasting Company, Inc.; and *Robert A. Zauner* for the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: March 7, 1983; Released: March 11, 1983)

1. By *Hearing Designation Order*, 47 Fed. Reg. 41630, published September 21, 1982, the Commission, by the Chief, Broadcast Bureau, designated the mutually exclusive applications of White Mountain FM, Inc. and Profile Broadcasting Company, Inc., to construct a new FM station at Littleton, New Hampshire, for hearing on the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications, if either, should be granted.

2. In specifying the above issues, the Broadcast Bureau Chief noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Therefore, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other

primary aural services in such areas, will be considered under the standard comparative issue.

3. A prehearing conference was held on November 19, 1982. The evidence in this case was presented in written form on January 5, 1983 and subjected to objections at an oral hearing session held with counsel on January 19, 1983. The applicants did not request cross-examination of the written testimony and the record was closed on January 19, 1983. Proposed findings of fact and conclusions of law were filed by all parties on February 4, 1983 and replies were filed by the applicants on February 14, 1983 and the Mass Media Bureau on February 15, 1983.

FINDINGS OF FACT

4. *Diversification of control of the media of mass communications*: Profile is the licensee of station WLTN(AM) located in Littleton, New Hampshire. WLTN(AM) operates on 1400 kHz, 1000 watts daytime, although a construction permit has been granted for 2.5 kW daytime. The station is licensed to operate with 250 watts nighttime. Littleton has no other commercial broadcast facility and only one non-commercial facility, a television station, WLED-TV, Channel 49, operated by the University of New Hampshire. White Mountain Exh. 2. The only other media outlet in the community is a weekly newspaper, the *Courier*. *Id.* Profile and its principals have no other media interest. Profile Exhs. 1, 2, 3. Neither White Mountain nor its principals has any media interests. White Mountain Exh. 2, at 2.

5. *Full-time participation in station operation by owners*: White Mountain is owned by Kathleen G. and Thomas M. Pancoast; they each hold 50 percent of the 100 shares issued. Ms. Pancoast would work 40 hours per week at the station as the General Manager, Sales Manager, News Director and Director of Public Service Programming. White Mountain Exh. 1. Ms. Pancoast lives in Littleton, she has no recent broadcast experience, and for over ten years she has participated in the civic affairs of Littleton. She is also the President and a Director of White Mountain. *Id.*

6. Mr. Pancoast would work 40 hours per week at the station as Program Director, Promotion Manager, Assistant Sales Manager, Assistant News Director, and Chief Financial Officer. White Mountain Exh. 2. Mr. Pancoast lives in Littleton, he has no recent broadcast experience, and for over ten years he has been active in the civic affairs of the community. *Id.* Mr. Pancoast currently practices law 25 hours per week, acts as the trustee of a savings bank, and two days a week works as a Master for the New Hampshire Superior Court. *Id.* If a grant is made, he would resign his position with the Superior Court and reduce his law practice to 10–15 hours per week. *Id.*

7. Profile's shares are held jointly by Peter C. Aydelott, who is its

President and a Director, and Judith F. Aydelott, who is its Vice President, Treasurer, and a Director. Profile Exh. 1(P). Mr. Aydelott would work full time as Station Manager and Ms. Aydelott would work full time as Business Manager. *Id.*

8. Mr. Aydelott currently works at WLTN(AM), Littleton, New Hampshire and, therefore, has broadcast experience. He has, since 1975, been active in the civic affairs of Littleton. Profile Exh. 2(P). He lives in Sugar Hill, New Hampshire, which is eight miles from Littleton. *Id.* Ms. Aydelott has been active in Littleton civic affairs, she is the Business Manager for WLTN, and she lives in Sugar Hill. Profile Exh. 3(J).

9. *Auxiliary power*: White Mountain proposes auxiliary power. White Mountain Exh. 2, at 7.

10. *Comparative coverage*:

Tabulation of Populations and Areas*

	White Mountain		*Profile*	
	Population	*Area (Sq. Miles)*	*Population*	*Area (Sq. Miles)*
Total within 1.0 mV/m (60 dbu contour)	19,124	537	24,766	574
Total within Common area	14,348	376	14,348	376
Total within Uncommon area	4,776	161	10,418	198
Service provided to Uncommon area:				
	DAYTIME			
Second	1,258	58	218	19
Third	3,218	85	161	8
Fourth	286	17	5,370	3
Fifth	14	1	3,545	127
Service provided to Uncommon area:				
	NIGHTTIME			
Second	3,150	98	397	33
Third	1,626	63	8,374	159
Fourth	0	0	1,657	6
Fifth	0	0	0	0

*Joint Exh. 1
Profile Exh. 4(G), at 13.

CONCLUSIONS OF LAW

11. White Mountain and its owners have no media interests, while Profile Broadcasting is already the licensee of Littleton, New Hampshire's only radio station, WLTN(AM). WLTN operates both daytime and nighttime. Therefore, White Mountain is entitled to a substantial preference over Profile Broadcasting on the diversification criterion.

12. Kathleen G. Pancoast and Thomas M. Pancoast are equal owners of White Mountain. They both would work full time at the station in management positions, they are long-time residents of the community and are active in the civic affairs of Littleton. Ms. Pancoast, who is White Mountain's President, would be the Station Manager. She would hold significant programming policy positions at the station and because she is a woman in these positions, she receives additional preference.

13. Peter C. Aydelott and Judith F. Aydelott jointly own the shares of Profile. Like the Pancoasts, they would work full time at the station in management positions. They live eight miles from Littleton in Sugar Hill, New Hampshire, but they are active in Littleton's civic affairs and they operate an AM radio station in Littleton. They both have broadcast experience. Ms. Aydelott, like Ms. Pancoast, receives an additional preference because she is an integrated woman, albeit not in a position as important as the one to be held by Ms. Pancoast.[1]

14. White Mountain is entitled to a preference for its proposal to provide auxiliary power. It is also entitled to a slight preference for its superior second service aural coverage during the day to 1,258 persons (compared to Profile's 218) and to 3,150 at night (compared to Profile's 397). Overall, Profile would actually provide service to more people within a slightly greater area than White Mountain, but the gain in service would be to a population that already has at least three, four or five services daytime and nighttime.

15. White Mountain's application is comparatively better than Profile Broadcasting's because it would enhance diversification in the community. White Mountain, in addition, receives credit for its auxiliary power and slight credit for its provision of a second aural service. On the basis of integration the applicants stand nearly equal.

ACCORDINGLY, IT IS ORDERED that the application of White Mountain FM, Inc. (File No. BPH-810408AC) for FM Channel 292A at Littleton, New Hampshire IS GRANTED and the application of

[1] Each of the parties has argued that the other would not perform its promised integration. White Mountain argues that the Aydelotts could not work full time at the station because they already work at WLTN(AM). Profile argues that Mr. Pancoast could not work at the station and still practice law, since both jobs require the same daily hours. Neither of these arguments are supported by record facts. There is no record evidence about what the Aydelotts plan to do about their jobs at WLTN; in fact, there is no record evidence about how much time the Aydelotts now spend at WLTN. On the other hand, Mr. Pancoast has explained how he will accommodate his law practice and his position at the station; his explanation, which is reasonable, is unquestioned on the record and must, therefore, be assumed to be true.

Profile Broadcasting Company, Inc. (File No. BPH-811027AL) IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN, *Administrative Law Judge*

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

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